

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period

July 1, 1948

Through September 30, 1948

Volume No. 52

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from July 1, 1948, through September 30, 1948.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

**QUARTERLY REPORT
OF THE
ATTORNEY GENERAL**

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OPINIONS

July 2, 1948.

Hon. James V. Jordan,
Budget Officer,
Department of Finance,
CAPITOL.

State—Employees—Travel Expenses.

Where an employee of one state department travels within or without the state in attending to business for another department, the travelling expenses of such employee may legally be paid from the funds of the latter department.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 14, 1948, is as follows:

"This office is presented from time to time with a problem pertaining to the reimbursement and payment of expense accounts to employees within the State Service. The instant problem to which I invite your attention pertains to travel expense to a State employee when the service that he rendered for which the expenses are incurred is for a department other than the one in which he is classified and in which he holds his permanent status, that is to say, if an employee is loaned from A department to B department for some special mission, cannot the expenses incurred in the mission be paid by B department?

"This is not a general practice, of course, but happens in specialized and expert or technical fields throughout all the departments from time to time.

"Please render your official opinion at your earliest possible convenience as to whether or not payment for such expenses as outlined herein is authorized.

"I trust it will be convenient for you to let your official answer come forward prior to July 1, 1948.

"Thank you very much for your past consideration."

In answer to your request, you are advised that, in my opinion, the expenses of a State employee travelling in the manner outlined in your request may legally be paid in the manner therein set out. That is to say the travelling expenses of an employee of department A, when such employee is attending to business which is beneficial to department B, may legally be paid by department B.

From an examination of the General Appropriation Act of 1947 (Act No. 320, General Acts 1947, page 183), I do not find any instance where the legislature has broken down the appropriation to any department to the point where a specific amount is appropriated "for travelling expenses." However, it is to be noted that to practically all departments there is an item of appropriation "for other expenses." As a matter of fact, the Legislature has left the breakdown of this item to you as budget officer, and I might add wisely so. I am advised that when you prepare the budget for the several departments of the State, you take this item "for other expenses" and break it down into several categories, one of which is "for travelling expenses." Of course, an appropriation made to any department is to be used by that department and for the purpose or purposes appropriated.

Now we come to your specific question. Are the travelling expenses of an employee of one department on business for another department a legal expense of the latter department, and is this a legal expenditure of the appropriation of the latter department?

Certain it is that the department employing the person would derive no benefit from his mission on the other department's business.

Therefore, applying the rule of common sense to the situation presented, you are advised that the department deriving the benefit of the services of a State employee on a certain mission may pay such employee's travelling expenses. In my opinion, this is an expenditure of the department which derives the benefit of the employee's service on this special mission, even though such person is employed by another and different department of the State.

This conclusion is strengthened by the fact that I find no statutory provision requiring that the travelling expenses of a State employee must be paid out of the appropriation or funds of the department by which he is employed, and also by the administrative practice in regard to this matter which has been indulged in by the various State departments for many years.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 2, 1948.

Hon. E. J. Gunny Gonzales,
Member, Board of Registrars,
Mobile County,
1508 Bobolink Drive,
Mobile, Alabama.

Board of Registrars—Transfer of Voters—Purging.

Title 17, Sections 38-40, Code of Alabama 1940, as amended
by Act No. 482, General Acts 1947, page 331.

In the event of the rearrangement of the ward lines of a city, the transfer of the name of any voter from one ward to another, or the purging of the name of any voter from the registration list, is a matter within the sole authority of the Board of Registrars.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of May 14, 1948, is as follows:

"In 1945, the City Commissioners of Mobile, Ala., redistricted all of the old city wards which were only eleven at that time but now increased to nineteen.

"From ward one to ward eleven the boundaries of these certain wards at the time of the redistricting were completely changed to another section of the city in which at the present time they exist. After the city wards were redistricted, the Mobile County Board of Registrars made a complete canvass of the voters in the City of Mobile. (The following example happened in each ward from one to eleven).

"For instance: The location of old ward one which at the present is the new ward two. The number of said ward one was transferred from its old location on North Royal Street in the downtown area to Toulminville, which is about six miles from its previous location and located on the out-skirts of the city.

"The Registrars during the canvass sent a canvasser into the location which once were ward one, but now ward two with instructions to check each house for voters and record them in the new number two. After the canvass of the voters were completed over the entire city, the Registrars compiled the names of the voters that were actually found by the canvasser within the boundaries of the New Ward Two and they were put into Ward Two to vote in future elections.

"(READ CAREFULLY PLEASE)

"After these lists of the various wards in the city were compiled by the Registrars as well as Ward Two, they were sent to the Probate Court for publication by same, according to law. Instead of the Probate Judge publishing only the list of the actual voters that were compiled and sent to him from the Board of Registrars, he took all the names of persons which once had voted within the boundaries of the old Ward One which the canvasser did not locate, and transferred said names from the location of the old Ward One to the location of the New Ward One, six miles away in a different

section of the city in which these said names did not reside at the time they were transferred. These names were transferred without the voters consent and personal knowledge. Some of these names might be of persons who are dead or who have moved from Mobile County with no intention of returning. I contend that instead of transferring the names that were not located by the canvasser, from one section of the city to another, the Probate Court should have kept all of the names that were not contacted by the canvasser in a separate file and when a person complained that their name was not on the polling list in the ward in which they reside, the clerk in the Probate Court could go to the file and check the ward in which the person once voted and put him or her into their correct ward.

"The Judge of Probate contends that he did not transfer any names from one ward to another, but merely transferred them into the same ward number. This is true, but he transferred the names of persons from one section of the city to another, into a section in which they never resided.

"This deplorable condition happened in each ward from one to eleven.

"I charge that there are ONE THOUSAND or more names added to the qualified voting list through this transaction.

"According to the Code of Alabama 1940, Title 17, Sec. 44, page 626, the way I understand it is that the Probate Court had no authority to do the transferring.

"I am sending to you a list of qualified voters that were transferred from one section of the city to another in which they never resided. These addresses were obtained from the 1947-1948 City Directory.

"As a public official and member of the Mobile County Board of Registrars I am asking you for a ruling on whether the Probate Court or the Probate Judge had the authority to do this transaction."

As I understand your request for opinion, the following are the facts related therein:

Subsequent to the rearrangement of the ward lines of the City of Mobile in 1945, the Board of Registrars of Mobile County made a canvass of the voters of the City of Mobile in an effort to ascertain the qualified electors residing in the wards as rearranged. The list compiled by the Board of Registrars as a result of such canvass failed to include certain names found upon the list of qualified voters existing prior to the rearrangement of such ward lines. These latter names, as I understand it, were not removed or transferred from the list, by wards, existing prior to rearrangement, but were allowed to remain as names of

qualified voters residing in the same wards in which such voters resided prior to the rearrangement of the ward lines. You inquire as to the authority and duty of the Judge of Probate in this matter, requesting that you be advised as to whether the Judge of Probate should have transferred the names of those qualified voters not contacted or located by the Board of Registrars in such canvass to the proper wards, as rearranged, or whether the names of such voters should have been allowed to remain upon the list of voters for the respective wards existing prior to rearrangement. In your request, you inform me that the Judge of Probate followed the latter procedure.

In my opinion, the Judge of Probate had no jurisdiction, authority or discretion at all in such matter, and could have done nothing more than he has done. Under the laws of this State governing registration of voters, the members of the Boards of Registrars alone have any authority to transfer an elector from one voting precinct, or ward, to another, in the absence of action on the part of the voter himself, or to purge the name of any qualified elector from the registration list. Biennial Report of Attorney General, 1934-36, page 702. The official lists of qualified electors required by law to be published by the Judge of Probate is compiled solely from the information furnished such Judge of Probate by the Board of Registrars of the county.—Title 17, Sections 38-40, Code of Alabama 1940, as amended by Act No. 482, General Acts 1947, page 331. Such was the holding of this office in an opinion rendered the Honorable F. B. Lloyd, Judge of Probate, Crenshaw County, Alabama, under date of March 19, 1948.

Such being true, the Judge of Probate had no alternative other than to allow the names of those persons not contacted or located by the members of the Board of Registrars in their canvass to remain upon the list as then existing. If, as stated by you, certain of such persons are now listed as qualified electors of a ward other than the ward of their residence, steps should be taken by the Board of Registrars, or by the voters themselves, to rectify such error. If it be true that certain of those persons now listed as qualified electors should be purged from the registration list, then the Board of Registrars should so purge the names of such persons according to law and furnish to the Judge of Probate the names of those persons so purged in order that these names may be removed from the list of qualified electors.

Until the above action is taken, the Judge of Probate is powerless to transfer the name of any elector to a different ward, or to remove the name of any elector from the registration list.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 2, 1948.

Hon. P. G. Lawley,
Tax Assessor,
Fayette County,
Fayette, Alabama.

Taxation—Exemption—Farm Tractors.

Farm tractors are not to be considered as farm tools in construing the provisions of Title 51, Section 2, Subsection (j), Code of Alabama 1940, as amended by Act No. 639, General Acts 1947, p. 491.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of February 13, 1948, is as follows:

"We now have assessed in our County quite a number of Farm Tractors, and equipment and Farmall and equipments and will thank you to give us your official opinion as to whether or not such Tractors and equipment are exempt from taxation under the wording contained in Act 639 (H 320) amending Section 2 Title 51 Code of Alabama 1940.

"Section 2 (J) —

"'Farming tools to the value of Five Hundred Dollars.'

"We have received from Mr. Eagerton, Chief Examiner, copy of the Supreme Courts ruling dated Oct. 22, 1947, and his letter dated Oct. 30, 1947, stating that in his opinion 'all assessments which have already been made should be amended to allow the increased exemptions.'"

It is my opinion that farm tractors, farmalls, and other such farming machinery are not entitled to the tax exemption granted to "farming tools" in Title 51, Section 2, Subsection (j), Code of Alabama 1940, as amended by Act No. 639, General Acts 1947, page 491. The pertinent provisions of the above code section are as follows:

"The following property and persons shall be exempt from ad valorem taxation and none other: * * * (j.) Provisions and supplies on hand for the current year for the use of the family and the making of crops; all wearing apparel; farming tools to the value of \$500; tools and implements of mechanics to the value of \$200; * * *." (Emphasis added).

The general rule is that statutes creating an exemption from taxation must be strictly construed. *Brown v. Protective Life Insurance Company*, 188 Ala. 166, 66 So. 47. Thus, we must now look to the accepted legal definition of the word "tool." The definition of tool as given in *Black's Law Dictionary* is as follows: "The usual meaning of the word 'tool' is an instrument of manual operation; that is, an instrument to be used and managed by the hand instead of being moved and controlled by machinery." (Citing authorities too numerous to list herein.)

Your attention is further invited to the holding of the Supreme Court of Vermont in the case of *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414. In that case the Vermont Court held that the term "tools" as used in the statute exempting from attachment such suitable apparel, bedding, tools, etc., as may be necessary for upholding life, should be construed to include such farm tools as are used by hand, and to include hoes, axes, pitchforks, shovels, spades, scythes, snaths, cradles, and other tools of that character; but it does not include machinery or implements used by oxen and horses, as carts, plows, harness, mowers and reapers.

In view of the above definitions of "tools," I am of the opinion that farm tractors and farmalls are not to be considered as "tools" within the meaning of Title 51, Section 2, Subsection (j), Code of Alabama 1940, as amended.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 2, 1948.

Hon. E. C. Hudson,
Judge of Probate,
Chairman, Commissioner's Court,
Blount County,
Oneonta, Alabama.

Hon. W. M. Rayburn,
Judge, 16th Judicial Circuit,
Gadsden, Alabama.

Hon. J. H. Disque, Jr.,
Judge, 16th Judicial Circuit,
Gadsden, Alabama.

Courts—Judges—Salaries—Blount County—Etowah County—
St. Clair County.

Supplemental salaries of the judges, of the 16th Judicial Circuit authorized by Title 62, Section 358, Code of Alabama 1940, may be paid only by the counties composing said Circuit.

Opinion by Assistant Attorney General Parker.

Gentlemen:

Your request for an official opinion bearing date of December 31, 1947, is as follows:

"Sections 357 and 358 of Title 62 of the 1940 Code provide that the salary of each circuit judge in the 16th Judicial Circuit shall be supplemented out of the treasury of each county composing such circuit, so that each judge shall, in addition to the annual salary paid such judge by the State of Alabama, receive the further annual sum of One Thousand Dollars. The sum paid on such supplemental salary by Etowah County shall be Eighty Percent of such supplemental salary, and by each remaining county in said circuit Ten Percent of such supplemental salaries. Such supplemental salary shall be paid in equal installments out of the treasury of each county upon the warrant of such judge.

"In January 1946, the Hon. J. H. Disque, Jr., and the Hon. W. M. Rayburn each began to serve, and is now serving, a six year term as Judge of the 16th Judicial Circuit, having been duly elected thereto, qualified and commissioned, and each was paid the above supplemental salary as provided by Sections 357 & 358.

"By the terms of the recently enacted 'Re-Circuiting Bill' No. 375—(S-151) approved August 16, 1947, Blount County was taken out of the 16th Circuit and placed in the new 27th Circuit created by the bill. By its terms the re-circuiting bill became effective upon its approval, to-wit: August 16, 1947.

"Since August 16, 1947, Judges Rayburn and Disque have duly presented warrants upon the Blount County treasury for payments of Blount County's share of their supplemental salary as provided in Section 358 of Title 62 of the code, they taking the position, (1) that under Section 155 of the Constitution providing that Supreme Court, Circuit Judges, Chancellors, Judges of Probate, shall hold office for six years and that the right of such judges to hold their offices for the full term prescribed cannot be affected by any change made subsequent by law in any circuit, division or county. In support of their contention they also cite *Ex parte Johnson*, 203 Ala. 579 (84 So. 803). (2) That their compensation cannot be diminished during the term for which they were elected under Section 150 of the Constitution, and authorities there cited.

"We would therefore respectfully request your official opinion on the following questions:

"(1) Is Blount County authorized to continue payments to said Circuit Judges of that county's share of their supplemental salaries

as provided in said Sections 357 and 358 of Title 62 of the 1940 Code? and

"(2) If not, by whom and in what proportions should their supplemental salaries be paid?"

In my opinion, the answer to your first question is in the negative.

It can hardly be seriously questioned that the Legislature had authority to change the 16th Judicial Circuit in the manner outlined in your letter. Constitution of Alabama 1901, Section 155; *State v. Black*, 199 Ala. 321, 74 So. 387; *Ex parte Roundtree*, 51 Ala. 42. "Indeed, the provision of Section 155 of the Constitution that the right of the judge to his full term shall not be affected by any change made in any circuit necessarily implies that changes in the circuits were authorized and were to be anticipated; the inhibition being against a disturbance of the term of the judge before its expiration." *Ex parte Johnson*, 203 Ala. 579-582, 84 So. 803.

It is well settled that the compensation of judges cannot be diminished during their terms in office. Constitution of Alabama 1901, Section 150, and authorities there cited.

Title 62, Section 358, Code of Alabama 1940, which applies only to the 16th Judicial Circuit, formerly composed of Blount, Etowah and St. Clair Counties, is as follows:

"§ 358. Supplemental salaries of circuit judges.—The salary of each circuit judge in the circuit, shall be supplemented out of the treasury of each county composing such circuit, so that each judge shall in addition to the annual salary paid such judge by the State of Alabama, receive the further annual sum of one thousand dollars. The sum paid on such supplemental salary by Etowah county, shall be eighty percent of such supplemental salary, and by each remaining county in said circuit, shall be ten percent of such supplemental salaries. Such supplemental salary shall be paid in equal monthly installments out of the treasury of each county upon the warrant of such judge." (Emphasis supplied.)

By the expressed terms of Section 358, *supra*, the salary of each circuit judge in the 16th Judicial Circuit "shall be supplemented out of the treasury of each county composing such circuit."

By the terms of "recircuiting bill," Act No. 378, General Acts 1947 (Ms.), approved August 16, 1947, Blount County is no longer in the 16th Judicial Circuit. Therefore, Blount County would not be authorized to continue payments under Section 358, *supra*, since such payments can be made only out of the treasury of a county within the circuit.

To hold otherwise would be to rule that Blount County must pay the judges for work that they are not only no longer authorized to do but are not doing.

Through the "recircuiting bill," the Legislature did not deprive any judge of his office by reducing the district wherein his authority lies. It simply reorganized judicial circuits. This, it had the right to do. *Ex parte Johnson*, supra. The judges of the 16th Judicial Circuit are still judges of that circuit. It is within the province of the Legislature to divide the State into convenient judicial circuits.

Having answered your first question in the negative, we come now to the question, who shall pay their supplemental salaries and in what proportions?

Again, we refer to the provisions of Section 358, supra, which provides that the salaries of the judges of the 16th Judicial Circuit "shall be supplemented out of the treasury of each county composing such circuit." Since the 16th Judicial Circuit is now composed only of Etowah and St. Clair, it becomes the duty of these two counties to make up between them that part of the judges' salaries formerly paid by Blount County.

Since the Legislature saw fit to provide for proportional payments from the three counties composing the 16th Judicial Circuit before the change, it is necessary to maintain, as near as possible, the same ratio between the two remaining counties.

By the terms of Section 358, supra, Etowah and St. Clair counties respectively, supplemented the judges salaries, at a ratio of eight to one. Maintaining the same ratio and applying it to the \$1,000 per year supplemental salary authorized to be paid to the judges of the 16th Judicial Circuit under Section 358, supra, it is found that Etowah shall pay eight-ninths of \$1,000 or \$888.89, while St. Clair shall pay one-ninth of \$1,000 or \$111.11.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 8, 1948.

Hon. Wilbur Poyner, Mayor,
Dale County,
Newton, Alabama.

Municipal Corporation—Elections.

1. The right to participate as a voter in any municipal election is restricted to the registered qualified electors residing within the corporate limits of such municipality.

2. The question as to one's legal residence for voting purposes is a mixed question of law and fact, governed by the intention of the voter concerned as expressed by his words and acts.

3. The absentee ballot law of the State applies to municipal elections.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 2, 1948, is as follows:

"We will have an Municipal election in the Town of Newton, Alabama, in the near future. I would appreciate your opinion on the following question: If a voter at one time lived in the Municipality where the only voting precinct for Beat 4, is located but, he moves away and established his home elsewhere even though he still retains his voting place in Beat 4, which is in the municipality of Newton, would he be a legal voter in the municipal election. We have good many that at one time lived in the municipality but, have moved away and established their home elsewhere that seems to think they still have a right to vote in an municipal election since they still retain their voting place in Beat 4, where the only voting place is located in the municipality of Newton.

"I hope I have made myself clear in asking the above question and I might have your opinion on the above at an early date."

In your request, you fail to inform me with sufficient clarity as to the present residence of those persons whom you state to have moved from the municipality and to have established their homes elsewhere. Answer to your inquiry depends, to a large extent, upon such facts, and I shall, therefore, answer your inquiry in the alternative.

The right to participate in any municipal election is, of course, restricted to the registered, qualified electors residing within the corporate limits of such municipality. The statutes of the State governing registration prescribe that each qualified elector, when registered by the Board of Registrars, shall be registered as a qualified elector of the precinct, ward, or district of his residence, while the statutes of the State governing elections prescribe that once registered, no voter shall vote at any place other than the precinct, ward or district in which such voter is at the time registered as a qualified elector.

If, therefore, those persons to whom you refer in your request, have moved from the limits of the municipality and have established their homes elsewhere within the voting precinct of which such municipality is a part with no present intention of returning to such municipality, then such persons are not properly qualified to participate in municipal elections held in such municipality even though they still be registered and qualified electors of such precinct and may lawfully participate in county and state elections held therein.

If, on the other hand, you refer to persons who have moved from the municipality to another place, within the county, state, or nation, and

have established a home elsewhere, but have displayed no intention of remaining permanently absent from such municipality, and have retained their voting privilege within the precinct of which such municipality is a part, and have continued to participate in elections therein, I am of the opinion that such persons are still privileged to participate in municipal elections held by such municipality.

It is specifically provided by Title 17, Section 17, Code of Alabama 1940, that no one shall lose his residence by temporary absence therefrom. Such statute is as follows:

"§ 17. Residence not acquired or lost by temporary absence.— No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."

A voter having acquired a legal residence, having been duly registered as a voter of the county and precinct, or ward, and having paid his poll tax therein for the year in which the election is held, may retain such residence until he has abandoned and removed therefrom with the intent to become a resident elsewhere. Temporary absence from one's residence for the purpose of his employment and the like, without the intent to abandon the home town and acquire domicile elsewhere permanently, or for an indefinite time, does not forfeit his right to vote. *Wilkerson v. Lee*, 236 Ala. 104, 181 So. 296; *Griffin v. Wall*, 32 Ala. 149.

In this connection, it has been held by former opinions of this office that the question of the place of one's legal residence is a mixed question of law and fact and that the answer to such question is governed by the intention of the person concerned as expressed by his words and acts. Biennial Report of Attorney General, 1934-36, page 332, and Biennial Report of Attorney General, 1934-36, page 478.

In the former opinions, above referred to, it was also stated that in determining the question of the intention of a party with regard to his place of legal residence, the declarations of such party, although admissible to prove residence, are not necessarily conclusive because they may be disproved by his acts, and that one of the most conclusive and common acts would be registration and voting in another place.

If, therefore, a person has moved away from such municipality and has established his home elsewhere with no intention of abandoning his domicile within such municipality, and has continued to exercise his voting privilege in the precinct in which such municipality is located, and has continued to pay such poll taxes as may be due to the county

in which he formerly resided, I am of the opinion that he is entitled to participate in elections held by such municipality, either by appearing in person and casting his ballot or by the casting of an absentee ballot in such election, it being specifically provided by Act No. 478, General Acts 1945, page 711, that the provisions of the absentee ballot law shall apply to municipal elections.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 8, 1948.

Hon. J. D. Mitchell, Director,
Department of Public Safety,
CAPITOL.

Highway Patrol—Public Safety Department.

Criminal investigators of the State Bureau of Investigation and Identification are "patrol employees of the State Highway Patrol" within the meaning of that term as used in Act No. 710, General Acts 1947, page 544, and are, therefore, covered by the retirement system established by said Act.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of May 11, 1948, is as follows:

"On January 21 and January 28, 1948, you rendered opinions to Hon. Bankhead Bates, Chief Highway Patrol, Department of Public Safety, and Hon. J. D. Mitchell, Director, Department of Public Safety, in which you held that the term 'patrol employee of the State Highway Patrol' used in Act No. 710, General Acts 1947 (Ms.), approved October 9, 1947, referred only to those employees of the State Highway Patrol who are assigned to duty as patrolmen (arresting officers), and that 'Highway patrolmen who are assigned to the Drivers' License Division of the Department of Public Safety come within the meaning of the term "patrol employees of the State Highway Patrol" used in Act No. 710, supra, and are, therefore, covered by the retirement system established by said Act.'

"The question has arisen as to whether or not employees of the Department of Public Safety who are assigned to the State Bureau of Investigation and Identification, which is a division of the Department of Public Safety, as plain clothes investigators (Criminal Investigators) come within the meaning of Act No. 710, supra. These investigators are given the regular merit system exami-

nation and physical examination the same as the men who are assigned to the uniform division doing patrol work and the same as the men who are assigned to the Drivers' License Division giving drivers license examinations. These men are also under a bond of \$2,000 each. They are sworn in and are issued commissions as arresting officers the same as all uniform officers. Men have been transferred from time to time from the uniform division to the investigation division and from the investigation division back to the uniform division. These men are also assigned territories throughout the state, and their duties come within the full meaning of the word 'patrol' as quoted by you from Webster's New International Dictionary, Second Edition.

"We shall appreciate your rendering an opinion as to whether the above-mentioned employees of the State Bureau of Investigation and Identification are covered by Act No. 710, supra."

In answer to your inquiry, it is my conclusion, based upon the facts set out therein, that criminal investigators of the State Bureau of Investigation and Identification (a branch of the Department of Public Safety) are "patrol employees of the State Highway Patrol" within the meaning of that term as used in Act No. 710, General Acts 1947, page 544, and are, therefore, covered by the retirement system established by said Act.

Cf. Opinion to Hon. Bankhead Bates, Chief, Highway Patrol, rendered under date of January 21, 1948 (Ms.), and opinion to Hon. J. D. Mitchell, Director, Department of Public Safety, rendered under date of January 28, 1948 (Ms.), copies of which are enclosed for your information.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 8, 1948.

Hon. Gordon Persons, President,
Alabama Public Service Commission,
State of Alabama,
Montgomery 1, Alabama.

Motor vehicles—Contract Carriers—Exemptions.

1. Motor carriers hauling loads of certain classifications are exempt from coverage by Motor Carrier Act of 1939 when a particular haul does not exceed seventy-five miles in distance.

2. Exemption of motor carriers hauling loads of certain classifications for distances not exceeding seventy-five miles applies even though they haul consecutively a series of such loads

throughout the State, the exemption being based upon distance of the haul and not upon hauling operations within a seventy-five mile radius of the carrier's base: Act No. 669, Sec. 2, General Acts 1939, page 1064 (Title 48, Section 301(2), Cumulative Pocket Part, Code of Alabama 1940).

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of September 10, 1947, is as follows:

"Section 2 of the 1939 Motor Carrier Act is that section which exempts certain carriers from jurisdiction by this Commission.

"Paragraph 'A', Subsection 3, exempts 'Motor vehicles' if engaged in hauling 'milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales or cotton seed, for a distance not exceeding seventy-five miles';

"There seems to be some question as to just what constitutes 75 miles. Namely, Carrier A, lives in Montgomery and his truck stays in Montgomery. Obviously, this carrier would be exempt when hauling the above items within 75 miles of Montgomery. However, some of these carriers take the position that you can go from Montgomery to Selma, a distance of approximately 50 miles and then, from Selma, they assume they can pick up another shipment and carry it to Monroeville. At Monroeville, it is their thought that they can go on to Mobile. Their interpretation is, of course, that the 75 mile exemption starts over again at each new point they pick up a shipment.

"It would seem to us that such an interpretation is incorrect. It is our thought that the 75 mile radius should begin at the point where the carrier lives and where his equipment is based and nothing else. Any other interpretation would mean that if the carriers were able to pick up business in each different locality, he would be able to go anywhere in Alabama without coming under the jurisdiction of the Commission, so long as each individual trip was not over 75 miles.

"We, therefore, respectfully request an opinion from your office on this subject."

Section 2 of Act No. 669, General Acts 1939, page 1064, approved July 5, 1940 ("Alabama Motor Carrier Act of 1939"), codified as Title 48, Section 301(2), Cumulative Pocket Part, Code of Alabama 1940, reads, in part, as follows:

"Section Two. This Act shall not be construed to apply to:
A. (3) Motor vehicles while used in the intrastate trans-

portation of property when the person furnishing the transportation is legally and regularly engaged in the business of selling such property; also motor vehicles if engaged in the business of selling such property; also motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales or cotton seed, for a distance not exceeding 75 miles, or fertilizer when being hauled directly to a farm, for a distance not exceeding 150 miles; All motor vehicles hauling property for hire and exempt under subsection A(3) of Section 2 must before transporting such property secure a permit from the Department of Revenue of the State of Alabama, which permit shall be furnished without cost upon proper application. Such permit shall be issued under reasonable rules and regulations promulgated by the Department of Revenue of the State of Alabama.” (Emphasis supplied).

It will be noted that although motor vehicles hauling cargoes answering to the above classifications are exempt from coverage by the Motor Carrier Act if the haul does not exceed seventy-five miles (or one hundred fifty miles for fertilizer), yet such carriers must secure a permit from the Department of Revenue.

It will further be noted that the exemption of carriers hauling loads in these classifications is based upon the distance of the haul rather than upon the geographical location of point of origin and destination. The Act contains no reference to hauls within a seventy-five mile radius of any particular point. Distance of the particular haul and classification of the load are the only criteria in determining exemption. Conceivably an itinerant trucker might have no base and yet make constant and consecutive seventy-five mile hauls throughout the State.

In a previous opinion, I have interpreted the Act to mean that the exemption will apply so long as the distance does not exceed seventy-five miles on any one trip or load and over any route in the State. See Quarterly Report of Attorney General, Vol. 30, page 69.

Therefore, it is my judgment that a carrier making a series of seventy-five mile hauls is exempt if no particular load, or any part thereof, exceeds that distance. I find no basis for assuming that the Act exempts only those carriers which haul within a seventy-five mile radius of their base. I know of no rule or regulation of the Department of Revenue to the contrary.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 8, 1948.

Hon. W. H. Haigler,
Secretary-Treasurer,
State Licensing Board for General Contractors,
702 Washington Avenue,
Montgomery, Alabama.

Partnerships—Licenses—State Licensing Board for General Contractors—Title 43, Section 33(4), Code of Alabama 1940.

Where the State Licensing Board for General Contractors has issued a license to a partnership consisting of two members and one member transfers his interest to another person, said transfer effects a dissolution of the partnership and a new license must be obtained by the new partnership firm even though said firm continues to operate under the name of the former partnership.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of June 15, 1948, is as follows:

"The State Licensing Board for General Contractors respectfully request your official opinion on the following matter:

"If the Board has issued a license to X partnership, composed of partners A and B, and partner B withdraws from the partnership and his place is taken by partner C, with the partnership continuing to do business under the same name as before, does the partnership composed of partners A and C have the right to continue to do business under the license issued to the partnership which was composed of partners A and B, or does such partnership have to obtain a new license?"

Under Title 43, Section 33, Code of Alabama 1940, the following is set forth in pertinent part:

"A general partnership is dissolved as to all the partners: * * * * *

(4) by the transfer to a person, not a partner, of the interest of any partner in the partnership property; * * * * *"

In an interpretation of the above statute, the case of *Lake v. Sealy*, 231 Ala. 466, 165 So. 399, held that the transfer by a partner of his interest in the partnership and assets to persons who were not partners, acted to dissolve the partnership by operation of law.

Similarly, the case of *Webb v. Butler*, 192 Ala. 287, 68 So. 369, held that every change in the personnel of a partnership works a dissolution.

In view of the above cited authorities, it is my opinion that a transfer of interest to another person by one of the partners of a partnership licensed under the State Licensing Board for General Contractors, effects a dissolution of said partnership, and therefore all rights under the existing license, even though the business is continued under the former partnership name. It appears to me that in such a situation a new license is required in the same manner as any newly organized partnership firm, and you are so advised.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 12, 1948.

Hon. Ward W. McFarland,
State Highway Director,
State Highway Department,
CAPITOL.

Statutes—Highways and Highway Department.

Act No. 444, General Acts 1939, page 595, approved September 22, 1939, was not repealed by its omission from the Code of Alabama 1940; and said act will remain in full force and effect until its purposes are accomplished.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 29, 1948, is as follows:

"In 1939 the Legislature of Alabama enacted Act No. 444 which was approved September 22, 1939 (General Acts 1939, page 595) authorizing and empowering the State Highway Department to acquire by gift, purchase, condemnation or otherwise such lands in fee simple and easements over such lands as are required by the United States Department of Interior for the development of that portion of the Natchez Trace Park traversing the State of Alabama, and to convey such lands so acquired and easements over such lands so acquired to the United States Government and to provide the funds to be used in making such requisition and conveyance.

"Our conception of this Act is that it is a local or special Act as it affects only Lauderdale and Colbert Counties and is not of general and permanent nature as it applies only to the Natchez Trace Parkway which, when completed the usefulness of the act and the need for it will cease.

"In compiling the 1940 Code of Alabama, this Act was omitted and due to this condition the question has been raised as to whether this Department retains the authority to proceed with the acquisition of lands under this Act.

"It is therefore requested that you advise if in your opinion the Act is still valid under provisions of Title 1 Section 9 of the 1940 Code and if this Department still retains the powers authorized when said Act was enacted."

In answer to your request, you are advised that, in my opinion, Act No. 444, General Acts 1939, page 595, approved September 22, 1939, was not repealed by its omission from the Code of Alabama 1940, and said act will remain in full force and effect until its purposes are accomplished.

A recitation of Act No. 444, in its entirety, would serve no useful purpose in this opinion. Suffice it to say that this act authorizes the State Highway Department to acquire by gift, purchase, condemnation, or otherwise such lands as might be needed to develop that portion of the Natchez Trace Parkway traversing the State of Alabama; provides funds for their acquisition; and provides that when these lands have been acquired the State Highway Department shall convey the same in fee simple to the United States Department of Interior.

A thorough perusal of the Code of Alabama 1940 reveals that this act was not brought forward into the code.

Therefore, the question arises as to whether this act was repealed or whether it was saved by Title 1, Section 9, Code of Alabama 1940, which section reads as follows:

"Laws continued in force and laws repealed by the adoption of this Code.—This Code shall not affect any existing right, remedy, or defense, nor shall it affect any prosecution now commenced, or which shall be hereafter commenced, for any offense already committed. As to all such cases the laws in force at the adoption of this Code shall continue in force. But this section does not apply to changes in forms of remedy or defense, to rules of evidence, nor to provisions authorizing amendments of process, proceedings or pleadings in civil causes. Local, private, or special statutes, and those public laws not of general and permanent nature, and those relating to the swamp and overflowed lands, and those relating to the public debt, and appropriations, and any act submitting an amendment to the Constitution, and any act to be effective upon the adoption of such an amendment to the Constitution, are not repealed by this Code. But subject to the foregoing provisions, or as may be otherwise provided in this Code, all statutes of a public, general, and permanent nature not included in this Code are repealed." (Emphasis supplied.)

It is to be noted that Section 9 hereinabove quoted specifically provides that those public laws not of general and permanent nature are not repealed by being omitted from the code.

It is, therefore, necessary for me to determine whether or not Act No. 444, *supra*, is a public law not of general and permanent nature.

The Supreme Court of Alabama in the case of *Southern Industrial Institute v. Lee*, 234 Ala. 404, 175 So. 365, had occasion to consider whether or not a general act of the 1927 Legislature appropriating certain funds for the construction and equipping of buildings for the Southern Industrial Institute at Camp Hill, Alabama, was repealed by the enactment by the legislature of an act known as the Budget and Financial Control Act (Act No. 37, General Acts 1932, page 35). In the Budget and Financial Control Act there was a provision (Section 10 of said act) that all permanent appropriations, with exceptions not here material, were repealed as of the close of the fiscal year ending September 30, 1932. The Supreme Court had for consideration whether or not the appropriation made to the Southern Industrial Institute was a permanent appropriation within the meaning of the Budget and Financial Control Act.

In that case, the Supreme Court stated that the word "permanent" has a well defined meaning, such meaning being: "Continuing in the same state or without essential change; durable, fixed, stable; opposed to temporary," and drew an analogy between the appropriation there considered and city ordinances for paving streets, pointing out that paving ordinances adopted by municipal corporations were not embraced within those ordinances that were permanent in nature, since such ordinances were merely local and special, and that, when their end was accomplished, then the ordinances themselves were at an end and became historical and evidential only.

So it is here. Act No. 444, *supra*, was passed for a specific purpose, i.e., the obtaining by the State Highway Department of sufficient lands to develop the Natchez Trace Parkway, and when the purpose of this act is accomplished it might be said, as in the *Lee* case, that: "It is then consigned to the limbo of things which have served their purpose."

In the case of *Michael v. State, ex rel. Welch*, 163 Ala. 425, 50 So. 929, the Supreme Court of this State observed, in considering whether or not a statute was permanent, that: "Generally speaking, a permanent statute * * * is one which is understood to continue in force till its repeal."

The question is: Is Act No. 444, *supra*, an act of that character? I think not. When it has served its purpose, it is at an end without further legislative action.

As further evidence that Act No. 444, *supra*, is not of general and permanent nature is the fact that the original manuscript of the Code Committee reveals that the Committee considered this act to be tem-

porary. An examinaion of this original manuscript conclusively shows this to be true, because across the face of the pamphlet copy of this act considered by the Code Committee, the word "temporary" is written thereon.

In view of the holdings in the cases above cited and quoted from and from the evidence revealed by the original manuscript of the Code Committee, you are advised that, in my opinion, Act No. 444, supra, is a public law not of general and permanent nature and was therefore not repealed by its omission from the Code of Alabama 1940. Such act will remain in full force and effect until its purpose is accomplished, and then the act, having served its purpose, will be at an end without further legislative action.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 13, 1948.

Hon. Charles Edgar Young,
Clerk, Circuit Court,
Lauderdale County,
Florence, Alabama.

Costs and Fees—Convict Fund—Department of Corrections and Institutions—Pardons, Paroles and Probation—Fines and Forfeitures.

1. Court costs in criminal cases are not payable from the funds of the Department of Corrections and Institutions, unless the prisoner is delivered to penitentiary officials.

2. When sentence is suspended after defendant is convicted for a misdemeanor and sentence is remitted or pardon granted during such suspension, statutes do not require payment of court costs from funds of Department of Corrections and Institutions, with the exception of guard fees of sheriff.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion dated January 8, 1948, is as follows:

"Will you please at your earliest convenience give me a ruling on the following question:

"When a defendant is convicted of a misdemeanor and a hard labor sentence is imposed and said sentence is suspended under

Section 334, Title 15 of 1940 Code and said sentence is later remitted without the defendant having paid the costs, is the cost in this case, payable under Section 69, Title 45 of the 1940 Code of Alabama?"

With the exception of the sheriff's guard fee, it is my opinion that the costs in the case outlined in your inquiry are not payable from the funds of the Department of Corrections and Institutions under Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 57, General Acts 1945, page 58, approved June 1, 1945.

As a general rule, before costs are paid from the funds of the Department of Corrections and Institutions, under the provisions of Title 45, Section 69, Code of Alabama 1940, as amended by Act No. 57, General Acts 1945, page 58, approved June 1, 1945, it is required that the defendant be delivered to the custody of penitentiary officials. Title 45, Section 72, Code of Alabama 1940.

There are at least two exceptions to this statute. One exception is that when probation is granted, costs are payable from the convict fund even though the defendant is not delivered to the penitentiary. Title 42, Section 25, Code of Alabama 1940, as amended by Act No. 426, General Acts 1945, page 666, 670, approved July 7, 1945. The other exception is that the guard fee of the sheriff may be paid from the convict fund or funds of the Department of Corrections and Institutions as soon as the prisoner is convicted and sentenced. Act No. 483, General Acts 1945, page 721, approved July 7, 1945.

There may be other exceptions not referred to in this opinion.

When a defendant is sentenced to hard labor for the county and his sentence is suspended under the provisions of Title 15, Section 334, Code of Alabama 1940, the mere suspension of the execution of the sentence for a certain time does not operate to place the defendant on probation. If, during the period of suspended sentence, the defendant has his fine remitted or is pardoned, it is my opinion that such fact would not require the Department of Corrections and Institutions to pay costs.

In such case, the pardon or remission would be granted under the provisions of Title 42, Section 16, Code of Alabama 1940. This section makes no provision for the payment of court costs when a pardon is granted or fine remitted.

Since there is no statute authorizing the payment of court costs, when a sentence is remitted or pardon granted, from the funds of the Department of Corrections and Institutions, it is my judgment that this fund would not be liable because the defendant is not delivered to the penitentiary.

In the case outlined by your inquiry, however, the sheriff's guard fee referred to in the second exception above noted would be payable from the convict fund.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

July 13, 1948.

Hon. Frank A. Reagan,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Alabama Alcoholic Beverage Control Act—Counties—Elections.

1. Under the provisions of Title 29, Section 68, Code of Alabama 1940, a petition of at least twenty-five percent of the number of voters voting in the last preceding general election requesting that an election be held to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold and distributed in said county must be filed with the Judge of Probate before an election can be called.

2. The petition must be predicated upon the question of whether the county as a whole should become "wet" or "dry" and not on the question of whether certain municipalities therein should be "wet" or "dry."

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of July 8, 1948, is as follows:

"A petition has been filed in my office requesting that an election be held to determine whether the County will be wet or dry. Due to the wording of the petition, I would like for you to give me a ruling as to whether the petition is legal or not. The petition reads: 'TO THE PROBATE JUDGE OF ETOWAH COUNTY, ALABAMA: We, the undersigned voters of Etowah County, Alabama, petition you to hold an election in Etowah County, Alabama, to authorize the selling of alcoholic beverages in said County. This petition is being made under the authority of Section 68, Title 29, Code of Alabama, 1940. The sale of said alcoholic beverages to be restricted to the corporate limits of the City of Attalla and the City of Gadsden, Etowah County, Alabama.'

"Assuming that this petition has the required number of signatures of legal voters, is the petition sufficient for me as Probate Judge to call an election thereon?

"Title 29, Section 68 of the 1940 Code of Alabama states 'On the ballot to be used for such election the question shall be in the following form, "Do you favor the legal sale and distribution of alcoholic beverages within this County? Yes_____ No_____."' If the aforesaid petition is sufficient for me to call an election, is the last sentence of the petition, to-wit: the sale of alcoholic beverages to be restricted to the corporate limits of the City of Attalla and the City of Gadsden, Etowah County, Alabama, to be treated as mere surplusage?

"If the latter question is answered in the affirmative, would these surplusage words affect the legality of the petition inasmuch as the petitioners signed the petition with the void restrictions?"

I am of the opinion that your first inquiry should be answered in the negative.

Title 29, Section 68, Code of Alabama 1940, provides in pertinent part as follows:

"* * * Any county in the state may change its classification from wet to dry or from dry to wet, under this chapter in the following manner: Upon the petition of twenty-five percent of the number of voters voting in the last preceding general election being filed with the probate judge of said county, said probate judge must call an election for said county to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold or distributed in said county. * * * * Said election shall be held within not less than thirty days, nor more than forty-five days from the date of filing of said petition and notice thereof shall be given by the probate judge by publication at least three weeks before the date of said election, in a newspaper in the county, or, if there be none, by posting such notice at the court house apprising the voters of the county that an election will be held in the several precincts thereof, to determine whether such county shall be wet or dry under the alcoholic beverage control law. * * * * On the ballot to be used for such election the question shall be in the following form: 'Do you favor the legal sale and distribution of alcoholic beverages within this county? Yes_____no_____.' Only qualified voters shall vote in said election. If a majority of the voters voting in said election vote 'Yes,' said county shall be wet or remain wet under the terms of this section until said county shall in a subsequent election held under this chapter change to a dry county. If a majority of the electors voting in said election vote 'No,' said county shall be a dry county under the terms of this chapter until it shall by a subsequent election, held under this

chapter, vote wet. Said elections in said counties may be held at any time, provided a period of not less than two years must elapse between the dates of such elections. * * * *

Under the above statutory provisions, the filing of a petition of twenty-five percent of the number of voters voting in the last preceding general election is a prerequisite for the judge of probate to call an election as to whether or not a county shall be "wet" or "dry." Such a petition must be predicated upon the question of whether the county as a whole should be "wet" or "dry" and not on whether certain municipalities therein should be "wet" or "dry." The petition under consideration, construing the same as a whole and within the four corners thereof, is a petition predicated upon the county voting as a whole on the question of whether only certain municipalities therein should be "wet" or "dry" and not on the fundamental issue as to whether the county as a whole should be "wet" or "dry."

A proper petition under this section should be predicated on the county voting as a whole on the question of whether the county as a whole shall be "wet" or "dry." After the voters of a county vote in the affirmative on the question of the legal sale and distribution of alcoholic beverages within the county, the county as a whole is "wet," and the Legislature alone has the authority to determine whether the legal sale and distribution of alcoholic beverages shall be restricted to certain localities therein. Cf. *Steadman v. Kelley et al.*, (Ala.) 34 So. 2d. 152.

The premises considered, it is my opinion that the petition under consideration is not in proper form and is not legally sufficient to invoke the jurisdiction of the Judge of Probate to call an election thereon.

The answer to your first inquiry pretermits consideration of your second and third inquiries.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 13, 1948.

Hon. F. A. Brotherton,
Commissioner of Finance,
City of Jasper,
Walker County,
Jasper, Alabama.

Municipalities—Elections.

1. City Commissioners of Jasper, Alabama, elected in March 1946, soon after change in form of city government, hold office until the first Monday in October 1948.

2. Election of City Commissioners of Jasper, Alabama, to succeed first commissioners elected after change in form of city government, required to be held on the third Monday in September 1948.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of June 7, 1948, is as follows:

"In the first part of the year 1946 the City of Jasper adopted Commission form of Government. The Board of Commissioners was elected in March, 1946. Under Section 41 of Title 37 of the Code they are due to hold office until the first Monday in October of the third year following their election, which would be the first Monday of October, 1949. There is a contention that under the Section of the Code referred to an election must be held in September, 1948, for the officers who are to take office on the first of October, 1949. That section further provides that 'on the same date of each succeeding year' there must be an election for the member whose term expires in said year and that his term shall commence on the first Monday in October of said year. The terms of all the present members of the Board in Jasper expire the last of September, 1949.

"The members of the Board of Commissioners of Jasper request your opinion as to when the next election of City Commissioners is required to be held in the City of Jasper under the facts above set out and what appears to be the very awkward wording of Section 41 of Title 37.

"We will appreciate a prompt reply."

A correct answer to your inquiry depends upon legislative intent as expressed in the latter part of Title 37, Section 41, Code of Alabama 1940, which I quote as follows:

"* * * * The terms of office of such persons so elected shall commence immediately upon their election and qualification, and who shall hold office until the first Monday in October of the third year following, and until their successors are elected and qualified, and an election shall be held on the third Monday in September of the year preceding the expiration of the term of office of said three commissioners, at which election three commissioners shall be elected for a period of one, two and three years, respectively, and on the same date of each succeeding year for the member of the board of commissioners, whose term shall expire in that year, the commissioner then elected shall hold office for a term of three

years from the first Monday in October of said year, and until his successor shall be elected and qualified for office."

As ascertainment of legislative intent in my judgment is based upon a determination as to whether the word "year" as used in the aforementioned section refers to a municipal official year, beginning on the first Monday in October and running for a period of twelve months therefrom, or a calendar year as mentioned and defined in Title 1, Section 2, Code of Alabama 1940.

If the **calendar year** is used as a yardstick to determine the legislative intent, the official terms of the Commissioners of the City of Jasper elected in March 1946, expire on the first Monday in October 1949. This for the reason that the first Monday in October of the third **calendar year** following does not occur until October 1949.

The same measurement of a **calendar year**, to preserve consistency, should likewise apply to the election and official terms of succeeding commissioners. Section 41, supra, provides that "an election shall be held on the third Monday in September of the **year preceding** the expiration of the term of office of said three commissioners, at which election three commissioners shall be elected for a period of one, two and three years, respectively * * * ." (Emphasis supplied.) The **calendar year** preceding would be the year 1948 preceding the year 1949 in which the official terms of the present commissioners would expire. Applying this yardstick, the succeeding commissioners so elected would not take office for more than a year after their election. Their official terms would then be staggered over a period of one, two and three years.

Section 41, supra, then provides an election shall take place " * * * on the same date of each succeeding year for the member of the board of commissioners, whose term shall expire in that year, the commissioner then elected shall hold office for a term of three years from the first Monday in October of said year * * * ." (Emphasis supplied.) The succeeding **calendar year**, as pointed out above, using the **calendar year** yardstick, to 1948 would be 1949, and the terms of all the commissioners elected in 1946 would expire in 1949, and their successors would have already been elected in 1948. It would be absurd to have another election in 1949 to elect officials already elected.

It could be argued that the election in September 1949, under the **calendar year** theory, would apply to the commissioner who would have been elected in 1948, and whose one year term would expire on the first Monday in October 1950. If this argument prevails, then there would be the anomalous situation of a successor to the one year commissioner being elected before the latter has even taken office. To avoid such a predicament, an election in 1949 would have to be omitted and one held in September 1950. In such an instance, the words " * * * of each succeeding year * * * " would have to be ignored as to the year 1949.

If legislative intent is predicated on a municipal official year, that is, from the first Monday in October and ending twelve months hence, there would be no absurdities as above outlined, and far fewer complications. The Commissioners of the City of Jasper, elected in March 1946, would go out of office, according to the official year yardstick, on the first Monday in October 1948. Their successors would have been elected in September 1948, for staggered terms of one, two and three years. In September 1949 (a succeeding year), an election would be held for the successor to the member "whose term shall expire in that year." Succeeding elections would be held in September of each succeeding year thereafter. There would not be a situation where an election in a "succeeding year" would have to be skipped in order to avoid the election of a successor before the predecessor has taken office. The successor to each commissioner would be elected in the year the term of his predecessor expires.

Aside from the above, I find that for years the elections for municipal aldermen have been held on the third Monday in September, and that the persons so elected have for a like period of time been taking office pursuant to law on the first Monday in October following the election. Since the legislature, by Section 41, supra, provided for the election of commissioners to be held on the third Monday in September, and for the persons elected at that time to take office on the first Monday in October following, I think it reasonable to assume that it intended to use aldermanic dates for holding elections and for taking office as a guide or pattern for the election of commissioners and for the time such officials shall take office. If not so intended, then the legislature has prescribed that more than one year shall elapse before a commissioner-elect shall take office. Such lapse of time is greater than that for other elected state, county or municipal officials. It has also given the original commissioners a term of more than three years, while limiting succeeding commissioners to three years and less.

Title 1, Section 2, supra, qualifies the definition of the word "year," and other definitions contained therein, by providing that they "shall have the signification attached to them in this section unless otherwise apparent from the context." I think it is apparent from the context of Title 37, Section 41, supra, as above pointed out, that the legislature did not intend to use the calendar year as a yardstick, but did intend to use the municipal official year for measuring the terms of office.

The first full official year of the original Commissioners of the City of Jasper, serving pursuant to said Title 37, Chapter 4, Article 1, Code of Alabama 1940, began on the first Monday in October after their election in March 1946, and ended twelve months after said first Monday. The first Monday in October 1947, was the beginning of their second full year, while the first Monday in October of 1948 will be the beginning of the third full year after their election. On this date, the terms of these commissioners will expire in conformity with Section 41, which says they "shall hold office until the first Monday in October

of the third year following * * * ." Cf. opinion to Honorable Roberts H. Brown, Attorney for the City of Auburn, Auburn, Alabama, under date of June 18, 1948, copy of which is enclosed.

I, therefore, conclude as follows:

(1) The election of the Commissioners of the City of Jasper to succeed the commissioners elected in March 1946, is required to be held on the third Monday in September 1948.

(2) The Commissioners of the City of Jasper who will be elected on the third Monday in September 1948, shall take office on the first Monday in October 1948.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 14, 1948.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
CAPITOL.

Schools—County Boards of Education—Health and Health Departments.

County Boards of Education are authorized to make appropriations to County Health Departments where the same are to be used exclusively for public health purposes connected with the public school system.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of February 2, 1948, is as follows:

"A County Board of Education would like to appropriate to its County Health Department sufficient funds to enable it to employ a Health Educator who will work in the schools of the county, directly with the principals, teachers and pupils thereof for the purpose of educating said persons in the science of healthful living.

"Your office has held (Biennial Report, Attorney General, 1918-20, page 261) that county school funds may be used for cooperative work between a County Board of Health and a County Board of

Education for public school inspections, and it would seem to follow that the right would hold also in the case of the important field of public health education.

"Your opinion is respectfully requested."

I am of the opinion that your inquiry should be answered in the affirmative.

The purpose of our entire educational system is to maintain efficient free public schools within the State of Alabama and within each county thereof. The protection and promotion of the health of the school children is a necessary adjunct to this express purpose, and, in my judgment, the county boards of education by implication possess the power to make such appropriations as are required to accomplish that purpose. The physical and mental powers of the individual are so interdependent that no system of education would be complete which ignored health. Our legislature, in recognition of this fact, provided for the physical examination of all pupils attending public schools and also provided for a program of physical education. See Title 52, Chapter 33, Sections 553 and 555, Code of Alabama 1940.

Title 52, Section 553, Code of Alabama 1940, specifically states that the several county boards of education and county boards of health shall cooperate fully with the State Board of Education and State Board of Health in the promotion of this work; and this office has heretofore held that county boards of education are authorized to make appropriations to county health departments to be used exclusively for public health purposes connected with the school system. Biennial Report of Attorney General, 1918-1920, page 261; Biennial Report of Attorney General, 1936-1938, page 783 and Quarterly Report of Attorney General, Vol. 12, page 185.

All of the foregoing considerations, as well as many others unnecessary to mention, convince me that an appropriation by the county board of education out of the general fund to county health departments, for the exclusive use and benefit of the schools, is authorized.

Cf. opinion this day rendered to Hon. Charles W. Thompson, Superintendent of Education, Coosa County, Rockford, Alabama.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 14, 1948.

Hon. Charles W. Thompson,
Superintendent of Education,
Coosa County,
Rockford, Alabama.

Schools—County Boards of Education—Health and Health
Departments.

County boards of education are authorized to make appropriations to county health departments to be used exclusively for public health purposes connected with the public school.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of July 3, 1948, is as follows:

"On March 26, 1948, Dr. C. S. Cotlin, Coosa County Health Officer, appeared before the Coosa County Board of Education and requested that the said Board make an appropriation of \$50.00 per calendar month to the Coosa County Health Department for the period of time from July 1, 1948 to June 30, 1949.

"The County Dentist, Dr. M. H. Crew, divides his time between the schools of Coosa and Elmore Counties. The Coosa County Board of Education has dental clinics in the three high school areas: Goodwater, Weogufka and Rockford. The Board of Education provided rooms in the school building at Rockford and Weogufka. The Board of Education does not provide any of the equipment that has been placed in the three high school areas. The dental chairs and other equipment have been provided by the Coosa County Health Department.

"In its meeting of March 26, 1948, the Coosa County Board of Education approved the following resolutions:

"WHEREAS, the Coosa County Health Department is rendering a valuable service to the school children of Coosa County, and

"WHEREAS, the said Department furnishes all equipment.

"BE IT RESOLVED that the appropriation of \$50.00 per month be made to the Coosa County Health Department for a period of 12 months from July 1, 1948 to June 30, 1949.

"A move was made by W. J. Maddox, seconded by P. O. Gilliland and the Board approved the appropriation.

"The request for the appropriation was made by the County Health Officer for the purpose of expanding the dental work in the three high school areas of the county. Specifically, the County Dentist will spend more time in the schools of this County.

"In view of the fact that this appropriation will expand the school dental program, and also in view of the fact that the Board of Education does not furnish or provide any of the dental equipment in the three high school centers, I wish to make the following inquiries:

"Inquiry No. 1—Does the Coosa County Board of Education have the necessary authority to make an appropriation of \$50.00 per calendar month to the Coosa County Health Department for the period of time listed above?

"Inquiry No. 2—In event that the Board of Education has the necessary authority to make this appropriation, is it legal to make the appropriation from the General School Fund of the County?

"Inquiry No. 3—If it is not legal to make the appropriation from the General School Fund of the County, is there any other school fund or school monies from which the appropriation can be made?

"An early answer to these inquiries will be appreciated."

I am of the opinion that your first inquiry should be answered in the affirmative.

The good health of our school children is a necessary prerequisite in obtaining an education. In view of our public school system and the resulting concentration of large numbers of children together, it is of the utmost importance that close guard be kept on their health and well-being. Our Legislature, in recognition of this fact, provided for the physical examination of all pupils attending public schools, and also provided for a program of physical education. See Title 52, Chapter 33 (Sections 553-559), Code of Alabama 1940. The physical examination of school children is also specifically provided for in Title 52, Sections 15 and 52, Code of Alabama 1940.—Quarterly Report of Attorney General, Volume 29, page 43.

This office heretofore held that county boards of education are authorized to make appropriations to county health departments to be used exclusively for public health purposes connected with the school system. Biennial Report of Attorney General, 1936-38, page 783 and Quarterly Report of Attorney General, Vol. 12, page 185.

The premises considered, it is my opinion that the appropriation in question by the County Board of Education of Coosa County to the

Coosa County Health Department, under the conditions set forth in your inquiry, is authorized.

In answer to your second inquiry, it is my opinion that said appropriation may be made from the general school fund of the county.

The answers to your first and second inquiries pretermits an answer to your third inquiry. Cf. Opinion this day rendered to Dr. D. G. Gill, State Health Officer, Department of Public Health, Capitol.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 14, 1948.

Hon. J. C. McGough,
Judge of Probate,
Ex Officio Chairman,
Court of County Commissioners,
Fayette, Alabama.

Counties—Fayette County—Statutes—Constitutionality.

1. Act No. 453, General Acts 1943, page 415 (Title 62, Section 9(1), 1945 Cumulative Pocket Part, Code of Alabama 1940), allowing additional compensation to the members of the commissioners court of Fayette County, is a local act, and the notice required by Constitution of Alabama 1901, Section 106, not having been given, renders it unconstitutional.

2. The compensation of members of the commissioners court of Fayette County is fixed by Section 6771, Code of Alabama 1923, as amended by Act No. 662, General Acts 1939, page 1049 (Title 12, Section 28, 1945 Cumulative Pocket Part, Code of Alabama 1940.)

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of March 3, 1948, is as follows:

"Please refer to Section 28, Title 12 of the 1940 Code of Alabama as amended by the 1939 Legislature (General Acts, 1939, page 1049), approved July 3, 1940, and to Section 9(1) of Title 62 of the 1940 Code of Alabama, passed as a general Act (General Acts, 1943, page

415), approved July 6, 1943, but with application only to Fayette County, Alabama, and advise me on the following questions:

"1. What is the legal maximum amount of per diem that can be paid to a county commissioner in Fayette County, Alabama, while engaged in inspecting and supervising the construction, maintenance, and/or repairs of the county roads and bridges?

"2. What is the legal maximum amount of per diem that can be paid to a county Commissioner in Fayette County, Alabama, for attending sessions of the Court of County Commissioners of said county?

"3. Under what condition, and out of what fund or funds, could the additional per diem of \$1.50 be paid to a county commissioner of Fayette County, Alabama, under the provisions of Section 9(1), Title 62 of the 1940 Code.

"State Examiners are now engaged in making an examination of the records and accounts of the Court of County Commissioners of this County, and your official ruling is needed at the earliest possible date."

Act No. 453, General Acts 1943, page 415 (Title 62, Section 9(1), 1945 Cumulative Pocket Part, Code of Alabama 1940), one of the statutes referred to in your inquiry, provides in part as follows:

"Section 1. That courts of county commissioners or other like governing bodies of all counties having a population of not less than 21,100 inhabitants and not more than 21,890 inhabitants, according to the last or any subsequent federal census, shall in addition to the duties now prescribed by law supervise the operation of all public libraries within such counties.

"Section 2. The members of such courts of county commissioners or like governing bodies shall personally supervise the construction, maintenance and repairs of all roads and bridges within such counties and keep a running inventory of all equipment used for the construction of roads and bridges within such counties.

"Section 3. Said courts of county commissioners or other governing bodies shall purchase for the county all equipment and machinery tools, materials and supplies. It shall be the duty of such county governing bodies to purchase the same at the best prices obtainable, receiving competitive bids therefor when practicable.

"Section 4. For the additional duties hereby imposed each member of such court of county commissioners or other governing bodies shall receive an additional per diem of \$1.50, payable as now provided by law for the payment of the per diem provided by law."

It is my opinion that this Act is clearly unconstitutional.

The Supreme Court, in the case of *Anderson v. Moorer*, 206 Ala. 301, 89 So. 452, had under consideration the constitutionality of Act No. 573, General Acts 1919, page 831, the title of which Act is as follows:

"To create the office of county solicitor in all counties having a population of not less than eighteen thousand one hundred and twenty-five and not more than eighteen thousand nine hundred according to the Federal census of 1910, or any Subsequent Census, and to provide for the election of such solicitor by the qualified electors of such counties and prescribe his qualifications and duties and fix his compensation."

In holding that Act No. 573, *supra*, was a local act and unconstitutional, in that it was passed in violation of Constitution of Alabama 1901, Section 106, the court said:

"This law does not appear to have been made in good faith a general law on population basis. It appears to be an evasion of the clear mandate of the Constitution. The intent seems arbitrarily to apply it to these 3 counties out of 67 counties as a local law, but with general law appearance through the population basis. This classifies it under the foregoing definition of this court as a local law, and not a general law. This act being a local law, and not a general law, and the notice required by section 106 of the Constitution of 1901 not having been previously given of its intended introduction into the Legislature, renders it unconstitutional; and therefore, it is inoperative and void. Sections 106 and 110 of Constitution, 1901; *Reynolds v. Collier*, 204 Ala. 38, 85 South. 465."

The following rule was laid down in the case of *Ward v. State*, 224 Ala. 242, 139 So. 416:

"The difference in population must be substantial, and the classification must be made in good faith and reasonably related to the purpose to be effected by the act. These conditions appearing, the fact that at the time the law may be applicable to only one political subdivision of the state, will not suffice for its condemnation. If, on the other hand, the classification is not in good faith, bears no reasonable relation to the difference in population upon which it rests in view of the purpose to be effected by such legislation, and was arbitrarily fixed, the law will be condemned as local, and as having been passed merely under the guise of a general law in violation of our Constitution. * * * * *

"If, however, the required legislation must itself be narrow and arbitrary and an unanticipated freak of chance and 'a turn of the wheel of fortune defying probabilities,' then of course the act itself bears the marks of arbitrary classification, and is to be condemned

as such. But, in either event, the requirement for future legislation is of evidentiary character, the effect of which is left to be determined as it arises under the peculiar conditions of each particular case.

* * * * *

See also *Dixon v. State*, 167 So. 340, 27 Ala. App. 64, cert. den. 232 Ala. 150, 167 So. 349.

Act No. 453, *supra*, applies to counties having a population of not less than 21,100 inhabitants and not more than 21,890 inhabitants. Fayette County with a population of 21,651 inhabitants according to the last (1940) federal census is the only county in Alabama within the population classification of Act No. 453. The population classification of this Act was arbitrarily chosen, the sole purpose being to allow additional compensation only to the members of the commissioners court of Fayette County. The Act is nothing more than a local act, and the notice required by Constitution of Alabama 1901, Section 106, not having been given, renders it unconstitutional.

It might be added that if Act No. 453 had been passed as a local law, it would have been unconstitutional as violative of Constitution of Alabama 1901, Section 96, which prohibits the Legislature from enacting "any law not applicable to all the counties in the State, regulating costs and charges of courts, or fees, commissions, or allowances of such officers." Quarterly Report of Attorney General, Vol. 7, page 126; Quarterly Report of Attorney General, Vol. 35, page 43.

It therefore follows that the compensation of members of the court of county commissioners of Fayette County is fixed by Section 6771, Code of Alabama 1923, as amended by Act No. 662, General Acts 1939, page 1049 (Title 12, Section 28, 1945 Cumulative Pocket Part, Code of Alabama 1940).

Answering your first inquiry, the maximum amount of per diem that may be paid to a member of the court of county commissioners of Fayette County, under the provisions of Section 6771, as amended, *supra*, while engaged in discharging his duties in respect to public roads and bridges of the county is \$4.00 per day.

In answer to your second inquiry, I wish to advise you that the maximum amount of per diem that may be paid to a member of the court of county commissioners of Fayette County, under the provisions of Section 6771, as amended, *supra*, for attending sessions of the commissioners court is \$4.00 per day.

The above conclusions render unnecessary a consideration of your third inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 14, 1948.

Hon. Shirley Smith,

Member, Board of County Commissioners of Lawrence County,
Moulton, Alabama.

Counties—Jail Building.

1. Under the provisions of Act No. 461, Local Acts 1935, page 257, approved September 13, 1935, the governing body of Lawrence County may use the proceeds of the three mill tax therein authorized to be levied for the purpose of constructing and equipping a jail building.

2. Any amount of the proceeds of this tax over and above that necessary to pay for the construction of the courthouse, which has already been built, may be used for this purpose.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of July 13, 1948, is as follows:

"I request your official opinion on the following:

"By local act passed in 1935, Local Acts 1935, page 257, the legislature authorized Lawrence County to hold an election to determine whether or not \$130,000 worth of bonds would be issued for the purpose of constructing, maintaining and equipping a courthouse and a jail. This election was held and the voters of Lawrence County authorized this bond issue. Due to the conditions at that time, the Board of Revenue of Lawrence County deemed it advisable to issue and sell only \$100,000 worth of these bonds.

"From the money received from this bond issue, a courthouse was constructed but no jail was built at that time.

"For your information, for the purpose of paying off these bonds a three mill tax was voted and levied for this purpose. From the collection of this tax, this bond issue has been reduced to \$19,000. At the present time, out of the receipts from the collection of this tax, the county governing body has purchased and owns \$39,590 worth of United States Government Bonds, and has \$14,074.74 cash in hand on deposit in the bank in Moulton, Alabama, in a special account. This \$14,074.74 is also a collection from this three mill levy.

"At the present time, there is something over \$29,000 cash in hand and government bonds over and above the amount necessary to retire this bond issue.

"From past experiences, the county has realized something like \$16,000 a year from this three mill tax levy. This three mill levy will continue through 1953. At that time there will be cash in hand and government bonds approximately \$100,000 in this account.

"From the above statement of facts, your opinion is requested as to whether or not the governing body of Lawrence County may use the proceeds of this tax over and above the amount necessary to retire this bond issue for the purpose of constructing and equipping a new jail, without issuing the additional \$30,000 worth of bonds, and could this money be encumbered for this purpose."

My answer to your first inquiry is in the affirmative.

The local act to which you refer in your request is Act No. 461, Local Acts 1935, page 257, approved September 13, 1935. Section 1 of this act reads as follows:

"§ 1. That the Governing Body of Lawrence County be and it is hereby empowered, authorized and directed to order an election, as hereinafter provided, to submit to the qualified electors of said county a proposal to authorize said county to issue bonds in a sum not exceeding \$130,000 for the purpose of constructing and equipping a court house and jail building, and to levy and collect over a period not exceeding twenty-five (25) years, a tax on all taxable property in said county at a rate not exceeding three mills, to provide a fund for the payment of the principal and interest of said indebtedness."

It plainly appears from the above quoted section of Act No. 461, supra, that the purpose for issuing the bonds therein referred to and levying the tax to retire the same was to construct and equip a courthouse and jail building. Due to the express wording of this section, it is not necessary to treat the amount which your governing body now has on hand as the result of this three mill tax as surplus arising from this special tax for the building of a courthouse. In truth and in fact, there is no surplus in this fund, as the tax was levied and the bonds were issued for the purpose of constructing a jail building as well as a courthouse.

You are, therefore, advised that in my opinion the funds which you now have on hand, and the funds which will come into your hands in the future as the result of this three mill tax levy, may now be used for the purpose of constructing a jail building.

Even in the light of treating the amount which you have on hand as surplus, it could still be used for the purposes indicated in your letter. In this regard, your attention is directed to an opinion of this office rendered to Hon. Frank O. Deese, Judge of Probate, Dale County, under date of November 13, 1947, Quarterly Report of Attorney General, Vol. 49, page 104. In that opinion the question of using a surplus arising from a special tax for the construction of roads and bridges for the purpose of

building other public buildings was considered. In that opinion this office held that the surplus arising from the Dale County tax could be used for the purpose of building public buildings after financial arrangements had been made to retire the outstanding bond issue.

The same situation exists in your county. You state in your request that the bond issue of \$100,000 has now been reduced to \$19,000, and your county has purchased United States Government Bonds in the amount of \$39,590, and has cash on hand in the amount of \$14,074.74 from the proceeds of this tax. As pointed out in the opinion rendered to Judge Deese, relying on the case of *Taxpayers and Citizens of Shelby County v. Shelby County, et al.*, 246 Ala. 192, 20 So. 2d 36, in truth and in fact, the purchase of United States Government Bonds in an amount sufficient to retire an outstanding bond issue at maturity, is, in legal effect, a payment and retirement of the bonds. Therefore, since your county now holds and owns United States Government Bonds, and has cash on hand from the proceeds of this tax, in an amount greatly in excess of the outstanding bonded indebtedness, in legal effect, this bond issue has now been retired.

Therefore, looking at the question presented by you in any light, it plainly appears that the proceeds now on hand as the result of this tax may be used for the purpose of building a jail building, and any future amount coming into your hands as the result of the three mill tax levy may also be used for this purpose.

You ask secondly if you may encumber the proceeds of this tax for the purpose of constructing a jail building.

My answer to this question is also in the affirmative. For the procedures that may be followed in anticipating this tax, I again refer you to the opinion rendered to Judge Deese, *supra*.

In conclusion, you are advised that it is my opinion that your county may use the funds it now has on hand as the result of this three mill tax levy, over and above the amount necessary to retire the outstanding bonds, for the purpose of constructing a jail building, and may also anticipate the future collections from this tax levy, in any of the methods pointed out in the opinion to Judge Deese, *supra*, for this purpose.

It appears that there is no necessity for the issuing of bonds for the purpose of obtaining sufficient funds to construct and equip a jail building, since you already have on hand sufficient funds for this purpose. However, if the issuance of bonds becomes necessary, \$30,000 of such bonds, payable from the proceeds of this special tax levy, could be issued pursuant to the election held under the authority of Act No. 461, *supra*. In any event, no new election for this purpose would be necessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 15, 1948.

Hon. Charles W. Terry,
State Personnel Director,
Personnel Department,
Montgomery 4, Alabama.

Merit System.

If the appointing authority (director) of a State department, who desires the attendance of an employee of another State department at a hearing held under the provisions of Title 55, Section 315, Code of Alabama 1940, requests the State Personnel Director to instruct such employee to attend such hearing, the expenses incurred by the employee in attending the hearing must be borne by the department whose appointing authority requested the attendance of the employee of another department at the hearing.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of December 16, 1947, is as follows:

"On November 8, 1947, I wrote a letter to Mr. Clarke M. Carpenter, an employee of the State Department of Veterans' Affairs, instructing him to be present in Montgomery, Alabama, on November 13, 1947, for the purpose of serving as a witness before the State Personnel Board. He was one of several witnesses requested by the Director of the Department of Conservation.

"My letter instructing Mr. Carpenter to report to Montgomery was based on the authority contained in Section 321, Title 55 of the Alabama Code of 1940. The wording of this statute indicates to me that it was the intention of the Legislature that employees who were called before the Personnel Board to give evidence on matters pertaining to the State Personnel Program should be considered as acting in line of duty and entitled to compensation from the Department in which they are employed. However, Mr. C. C. Horton, Director of the Department of Veterans' Affairs, has declined to pay the expenses of Mr. Carpenter and states that he does not interpret the above cited Code Section as fixing the responsibility for payment of this claim on his Department. The State Comptroller has informed me that it was not legal for me to submit an expense account for this employee of another State Department and a member of your Staff informed me several weeks ago that it would not be legal for the Conservation Department to pay the expenses of witnesses they had requested for this hearing other than their own employees.

"Since this matter involves different interpretations of a State Law I will appreciate an opinion from you on the following question:

"When the Director of one State Department requests the State Personnel Director to require an employee of another State Department to appear as a witness before the Personnel Board which Department is responsible for expenses incurred by the employee in complying with said instructions.

"Your early attention to this matter will be appreciated."

Title 55, Section 321, Code of Alabama 1940 (the statute referred to in your inquiry), is as follows:

"§ 321. Attendance of witnesses; fees; false oaths.—Any person who shall be served with a subpoena, issued in the course of an investigation or hearing conducted under any provision of this chapter, to appear and testify or to produce books and papers, who shall without good cause disobey or neglect to obey any such subpoena shall be guilty of a misdemeanor. The fees of witnesses for attendance and travel shall be the same as fees of witnesses before the courts of record and shall be paid from the appropriation for the expenses of the board. Any judge of a court of record, either in term time or vacation, upon application of a member of the board or the director, shall compel the attendance of witnesses, the production of books and papers, and the giving of testimony before the board or an agent thereof by attachment, or contempt, or otherwise, in the same manner as the production of evidence shall be compelled before said court. Any person who, having taken an oath or made affirmation in the course of any investigation or hearing under the provisions of this chapter, shall wilfully and knowingly testify or declare falsely, shall be guilty of perjury and upon conviction shall be punished accordingly. The director or the board shall require the attendance of employees who are needed as witnesses without subpoena."

It will be seen from the above section that witnesses subpoenaed to appear at an investigation or hearing made under the provisions of the Merit System Law are entitled to the same fees for attendance and travel as witnesses subpoenaed to appear before a court of record, to be paid from the appropriation made for the expenses of the State Personnel Board. Under the provisions of Section 321, *supra*, employees of the State may be required to attend such hearings and investigations without subpoena. The willful failure or refusal of a State employee to so attend is cause for removal. Title 55, Section 315, Code of Alabama 1940. It is my conclusion that these provisions put State employees in a different category from other witnesses subpoenaed to appear at such hearings or investigations as provided in Section 321. A State employee in attending hearings or investigations at the direction of the board is acting in line of duty as an employee of the State.

Under the provisions of Title 55, Section 315, Code of Alabama 1940, an employee, upon dismissal by the appointing authority of a State department, may within ten days from notice of dismissal file with the board and with the appointing authority an appeal from the action of the appointing authority. If demand is made in writing by the dismissed employee within ten days after notice of discharge, the board must order a public hearing on the matter.

It is my opinion that if the appointing authority (director) of a State department, who desires the attendance of an employee of another State department at a hearing held under the provisions of Section 315, supra, requests the State Personnel Director to instruct such employee to attend such hearing, the expenses incurred by the employee in attending the hearing must be borne by the department whose appointing authority requested the attendance of the employee of another department at the hearing. The appointing authority of the State department who dismissed the employee is the real party in interest and not the appointing authority of the employee of another department. In the case under consideration, the Director of the Department of Conservation is the real party in interest and not the Director of the Department of Veterans' Affairs.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 15, 1948.

Hon. J. W. Stuart,
Chairman, Commissioner's Court,
Jackson County,
Scottsboro, Alabama.

Counties—Insurance—Buildings.

1. The governing body of a county may make contracts of insurance for insuring the court house, jail, and other public buildings of the county for a period of time extending beyond the terms of office of the members of such governing body.

2. Such contracts of insurance may be made for a period of longer than twelve months.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of June 25, 1948, is as follows:

"Will you please render your opinion on the following questions:
"1— Can the Board of Commissioners contract with insurance

companies or their agents for insurance against fire and storm on the court house, jail and hospital for a period of time beyond the expiration of their term of office?

"2— Are contracts made with insurance companies for such insurance as fire and storm on court house, jail and hospital valid if made for longer term than twelve months, say for three years, or must new policies be issued every twelve months?

"These are questions which came up before the Board and your opinion will be greatly appreciated."

The authority of the governing body of a county to insure the court house, jail, and other public buildings of the county is found in Title 12, Section 12(23), Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, which is in part as follows:

"23. To insure in solvent companies the court-house, jail, machine shops and other buildings of the county against loss by fire and storm, * * * *"

There is no statutory provisions which would invalidate a contract of insurance made by the governing body of a county for insuring the court house, jail, and other public buildings of the county for a period of time extending beyond the terms of office of the members of such governing body.

The question then arises whether or not such a contract is void as contrary to public policy, in that it usurps the power of a succeeding administration. In the case of *Corning, et al vs. Patton*, 236 Ala. 354, 182 So. 39, the court held that a 50-year lease (contract) made by the county commissioners of Jefferson County of a former court house site was not void on the ground that it was contrary to public policy, in that it extended beyond the terms of the commissioners making the lease and usurped the power of a succeeding commission.

It is my opinion that your first inquiry falls within the holding of the *Corning* case, *supra*, and, therefore, should be answered in the affirmative. Cf. Quarterly Report of Attorney General, Vol. 12, page 124; Vol. 32, page 75.

In answer to your second inquiry, it is my opinion that the contracts of insurance under consideration may be made for a period of longer than twelve months. There is no statute which requires that such contracts of insurance be renewed every twelve months, nor is there any statute prescribing the length of time for which the same may be made. If the governing body of a county deems it advisable, it may make such contracts for a period of three years.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 15, 1948.

Hon. Tom C. Garner,
Judge of Probate,
Jefferson County,
113 Court House,
Birmingham 3, Alabama.

Jefferson County—Juvenile Courts—Partlow State School.

Juvenile and Domestic Relations Court of Jefferson County has original and exclusive jurisdiction to commit minors who are mentally deficient to Partlow State School under provisions of Title 62, Section 291, subsection 10, Code of Alabama 1940, and Title 45, Section 239, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of June 26, 1948, is as follows:

"Title 45, Section 239, Code of 1940, provides that applications for commitment of a mental deficient or feeble-minded person, if the person be under the age of twenty-one, may be made to the Judge of the Juvenile Court of the County of such person's residence, where a Juvenile Court exists in the County, and if over the age of twenty-one, to the Probate Judge of the County.

"Title 62, Section 291, Code of 1940, applicable to Jefferson County, defining Jurisdiction of the Juvenile and Domestic Relations Court, provides for the prosecution and punishment of persons charged with contributing to the dependency, neglect or delinquency of a male child under sixteen years of age, or a female child under eighteen years of age. This Section further provides that the Judge of such Juvenile and Domestic Relations Court shall have and exercise all the power and authority conferred upon Juvenile and Domestic Relations Courts in this Code.

"Your official opinion is respectfully requested to determine whether the Judge of the Juvenile Court, or the Judge of Probate of Jefferson County is vested with the power and authority to conduct Mental Deficients under 21 years of age to the Partlow State School.

"Your early reply will be appreciated."

You are advised that the Juvenile and Domestic Relations Court of Jefferson County has original and exclusive jurisdiction to commit minors, under the age of twenty-one years, to Partlow State School.

The jurisdiction of the Juvenile and Domestic Relations Court of Jefferson County is set out in Title 62, Section 291, Code of Alabama 1940. Among other types of jurisdiction, the Juvenile and Domestic Relations Court of said county, under subsection 10 of Section 291, *supra*, has jurisdiction over "(10) bills, petitions, or writs involving minors under Chapter 6 of Title 45; . . ." Chapter 6 of Title 45 includes that section, Section 239 of Title 45, wherein it is provided that the Juvenile Court has power and authority to commit minors to the Alabama Home or Partlow State School. In my judgment, an application to commit a minor to this school would fall within the provisions of subsection 10 of Section 291, Title 62, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 15, 1948.

Hon. S. Fleetwood Carnley,
Director of Industrial Relations,
Department of Industrial Relations,
Montgomery, Alabama.

Employees' Retirement System—Unemployment Compensation Administration Fund—Statutes—Constitutional Law.

1. Employer contributions to Employees' Retirement System with respect to member employees of the State Department of Industrial Relations whose salaries are paid from funds derived from Federal grants may be paid from the Unemployment Compensation Administration Fund.

2. Act No. 620, General Acts of 1947, approved October 13, 1947 (Ms.), although retroactive in operation, does not violate the State or Federal Constitution, no vested rights being impaired.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of October 21, 1947, is as follows:

"For the benefit of the Social Security Administration your opinion is requested as to.

"1. Whether or not the payments required to be made by subdivision 6(b) of Section 8 of the Retirement Act (No. 515, 1945) as amended are proper and lawful expenditures from the Unemployment

Compensation Administrative Fund established by § 248 of Title 26, 1940 Code, as amended?

"2. Is the new Act (No. 620, 1947) retroactive in operation and if retroactive does such retroactiveness violate any provision of the State or Federal Constitution?"

In my judgment, your question No. 1 should be answered in the affirmative, and in answer to your question No. 2, it is my opinion that Act No. 620 of the General Acts of 1947, approved October 13, 1947 (Ms.), is retroactive but does not violate any provisions of the State or Federal Constitution.

Act No. 515, General Acts 1945, page 734, approved July 9, 1945, is known as the Employees' Retirement System Act. This act establishes a method whereby certain employees of the State of Alabama may retire from service at a certain age and receive after retirement an annuity and a pension for the remainder of their lives. This program is partly financed by withholding from the member employee's salary a contribution for each payroll period. The program is also partly financed by contributions to the System from a State appropriation. Sections 8(6), 13, Retirement Act, *supra*.

Act No. 515, *supra*, and Section 8(6) thereof, was amended by Act No. 620, *supra*, and now provides as follows:

"(6) Employer's Contribution. (a) On or before the first day of February next preceding each regular meeting of the State Legislature, the Board of Control shall certify to the Governor the amounts which will become due and payable during the biennium next following to each of the funds of the Retirement System as the State's contribution on account of members of the System whose salaries are paid from funds derived from State sources. The amounts thus ascertained shall be included in the appropriation bill which is submitted to the Legislature. The Board of Control shall certify one quarter of the amount so ascertained for each year of the biennium to the State Comptroller on or before the last day of June, September, December, and March. The State Comptroller shall, on or before the first day of July, October, January, and April, draw a warrant or warrants on the State Treasurer for the respective amounts due the Retirement System. On receipt of the warrant of the State Comptroller, the State Treasurer shall immediately transfer to the Retirement System the amounts due. (b) The employer's contribution on account of the membership of employees whose salaries are paid in whole or in part from funds derived from Federal grants shall be paid from funds derived from said Federal grants in accordance with statutes governing the administration of said grants and in proportion to salaries paid therefrom. On or before the last day of March, June, September, and December, of each year following effective date of this Act, the Board of Control shall

certify to each department of the State receiving a Federal grant the amount due and payable from said grant as employer's contribution to the Retirement System on account of the membership of the employees of said department whose salaries are paid in whole or in part from funds derived from such Federal grants. The fiscal agent of the department shall authorize the State Comptroller to draw a warrant or warrants in payment of the amounts certified as due and payable from Federal grants. On receipt of said warrants of the State Comptroller, the State Treasurer shall immediately transfer to the Retirement System the amounts due. Immediately following the effective date of this Act the Board of Control shall certify to each department receiving Federal grants the amount due as employer contributions which has accrued as of that date, provided said department has funds derived from Federal grants available for payment of said contributions."

Section 8(6) of the Retirement Act, as amended by the 1947 Act, makes a distinction between member employees whose salaries are paid from funds derived from State sources and member employees whose salaries are paid from funds derived from Federal grants. In the first case, it is provided that the employer's contribution to the Retirement System should be paid from an appropriation out of the State treasury. On the other hand, the employer's contribution, in respect to those members of the System who receive their salaries from funds derived from a Federal grant, is to be paid from the fund derived from the Federal grant.

I am informed that the employees of the State of Alabama who are employed in the Unemployment Compensation Division of the Department of Industrial Relations are paid solely from funds derived from a Federal grant. These funds are granted to the State of Alabama under the provisions of Title 42, U.S.C.A., Sections 501, et seq. When such grants are received by the State of Alabama, they are paid into the Unemployment Compensation Administration Fund. Title 26, Section 248, Code of Alabama 1940, as amended by Act No. 310, General Acts 1943, page 281, 297, approved June 28, 1943. This fund, the Unemployment Compensation Administration Fund, is, in my opinion, one of the funds referred to in Act No. 620, supra (amending Section 8(6) of the Retirement System Act).

In my judgment, therefore, Act No. 620, supra, authorizes the payment of employer's contributions in respect to employees of the Unemployment Compensation Division of the Department of Industrial Relations out of the Unemployment Compensation Administration Fund. It is my further opinion that such employer contributions are necessary for the proper and efficient administration of the Unemployment Compensation Law.

The new act referred to in your inquiry, Act No. 620, General Acts 1947, approved October 13, 1947 (Ms.), is, of course, retroactive in

operation in that Section 1(6) (b) requires the payment of all employer contributions which have accrued as of the effective date of the Act (October 13, 1947). Since the Retirement System Act has been in effect since 1945, this provision requires employer contributions to be made in respect to those who have been members of the System prior to the effective date of Act No. 620, supra. I do not find, however, that the retroactive operation of Act No. 620 will impair any vested rights or other obligations, and it is my opinion that such Act does not violate any provision of the State or Federal Constitution.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Taxation—Counties.

County governing body may legally pay the 0.3% Federal Excise Tax (unemployment) on labor when such tax is billed as "costs" to the county within the provisions of a contract between the county and the contractor.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, dated January 16, 1948, is as follows:

"You are respectfully requested to advise me as to the legality of the attached copy of invoice insofar as the 0.3% Federal Excise Tax on labor is concerned.

"Can the County through its governing body legally pay this 0.3% Federal Excise Tax on labor?"

"Opinions of your office, Volume 33, Page 95 and Volume 34, Page 24, contain discussion of federal tax and state agencies, but do not deal specifically with the tax on labor which is in question."

I am of the opinion that your inquiry must be answered in the affirmative.

The constitutional immunity of the State, its political subdivisions, and instrumentalities, from Federal taxation is not infringed upon by

the exaction of a Federal Excise Tax (unemployment tax) from a private contractor in respect to performance of a contract with a county on a "cost-plus" basis, notwithstanding the fact that the economic burden is borne by the county. *State of Alabama v. King & Boozer*, 314 U. S. 1, 62 S. Ct. 43. The Federal Excise Tax is levied on the employer, who, in the instant case, is the contractor; thus, this tax becomes an item of cost to the contractor. Therefore, the legality of the payment of this item by the county to the contractor is determined by the express language of the contract between the county and the contractor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1948.

Hon. H. G. Greer,
Superintendent of Schools,
Monroe County,
Monroeville, Alabama.

Municipalities—Schools—Roads and Bridges—Funds.

Municipality of Monroeville, Alabama, has legal authority to finance the paving of a public driveway on school property of the Monroeville High School, even though same is located on property deeded to the State of Alabama and is under the jurisdiction of the Monroe County Board of Education.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of July 1, 1948, is as follows:

"We would like to obtain from you an advisory opinion regarding a municipality's authority for financing the paving of a public driveway on school property which is deeded to the State of Alabama. More specifically, the Monroeville High School is located on a ten-acre plot which is deeded to the State of Alabama, and is under the jurisdiction of the Monroe County Board of Education. On said school property there is a public driveway which the Monroeville town authorities have expressed a willingness to pave provided they have the legal authority to do so. I will greatly appreciate it if you will give us an advisory opinion regarding this matter."

It is my opinion that you have the legal authority to make the contemplated expenditure stated.

In the case of *Branyon v. Kirk*, 238 Ala. 321, 191 So. 345, the Supreme Court of Alabama held that our Constitution and laws impose upon

municipalities the power and duty to provide and maintain public streets. See also *Alabama Traction Company v. Selma Trust and Savings Bank*, 213 Ala. 269, 104 So. 517. This office, in Biennial Report of Attorney General, 1932-34, page 329, also held that generally speaking, the roads, bridges and streets within the corporate limits of a municipality belong to, and are controlled by such municipality, and that the power, authority and jurisdiction of a municipality in this regard is inherent.

Drawing from the above authorities, this office, in Quarterly Report of Attorney General, Vol. 48, page 42, held as follows:

"(1) The governing body of a municipality may expend public funds for the purpose of maintaining and improving the roads and streets located within the corporate limits of such municipality.

"(2) Such expenditure may be made from any funds within the city treasury not specifically earmarked for other purposes."

Your attention is also directed to the case of *Carey v. City of Haleyville*, 230 Ala. 401, 161 So. 496, where it was held that a municipality might donate funds to the county board of education in contemplation of a public school building being built in the city and that said donation was valid regardless of whether or not title and control of the building was retained by the county board of education. The court in this instance held in part as follows:

"True, the municipality may not have title to the school building and it may be under the control of the county board * * * and the affairs of the school being under like control. But cases of this character would deny the municipal corporation the power to donate any funds to the betterment of the schools located therein * * *. Yet the inhabitants of Haleyville received the benefit and enjoyed the privileges of these schools in their midst; and the mere fact that another and independent agency of the State controls their affairs is no reason for a denial of the right of the citizens, through their municipal authority, lending aid in support of such institutions."

All authorities considered, it is my opinion that the municipality of Monroeville, Alabama, has legal authority to finance the paving of a public driveway on the grounds of the Monroeville High School, even though such property is located on a ten acre plot which is deeded to the State of Alabama, and is under the jurisdiction of the Monroe County Board of Education. You are herewith advised accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Registrars—State Employees—Compensation.

The provisions of Title 41, Section 150, Code of Alabama 1940, are not applicable to an hourly employee of the State Docks and Terminals who is appointed and serves as a member of the board of registrars of a county.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of June 17, 1948, is as follows:

"In your opinion to Governor Folsom, dated October 14, 1947, you held that a person working on a job by the hour for the State Docks was eligible to hold a position as a member of the Board of Registrars of that County. Consequently, E. J. Gonzales, an employee of that department on an hourly basis, was appointed a member of the Board for Mobile County.

"A new question has arisen and that is the proper construction of Section 150 of Title 41 of the 1940 Code of Alabama, pertinent part of which provides that where the duties of more than one 'position' or 'employment' is filled or performed by one 'employee,' such 'employee' shall only receive salary for the highest paid 'position' or 'employment' so filled and discharged.

"I have been informed that this employee sometimes, if not frequently, sits one-half the day with the Members of the Board of Registrars and devotes the other one-half in the performance of duties assigned him by the State Docks.

"I will greatly appreciate the courtesy if you will advise me whether or not when this employee devotes part of a day in performance of the duties as Registrar and the other part in performance of service at the State Docks, he should be paid for both services or whether on such occasion he should be paid for service performed as a Member of the Board and not for service performed as an employee of that department; the rate of pay for services by the Board of Registrars being higher than that paid for duties performed for the state department."

I am of the opinion that Title 41, Section 150, Code of Alabama 1940, is not applicable to an hourly employee of the State Docks and Terminals.

This statutory provision was construed in a recent opinion of this office which is reported in Quarterly Report of Attorney General, Vol. 48, page 126. The following excerpt which is pertinent to your request is quoted from that opinion:

"Although not mentioned by you in your inquiry, I feel it necessary in a determination of this question to consider the provisions of Title 41, Section 150, Code of Alabama 1940, which section provides as follows:

"Wherever the duties of more than one office, position, or employment shall be filled, performed or discharged by one officer or employee, such officer or employee shall only receive the salary named for the highest paid office, position or employment so filled, performed or discharged."

"This statute was originally enacted at the Extra Session of the Legislature 1933 as a portion of Act No. 138, General Acts 1933, page 124. This act, known as the Lapsley-Lusk Bill, was enacted as an economy measure and provided for a reduction in salary for the major portion of the state officials, and included as an additional provision thereof the statute quoted above, now incorporated in the Code of Alabama 1940 as Title 41, Section 150.

"A study of this act reveals that it dealt with permanent positions of employment only and makes no reference to, nor in my opinion has an application to, temporary employees of the nature of a special court reporter. The evil such provision attempts to remedy is the holding by one person of two or more permanent positions of employment with the state and receiving compensation for each of such offices, positions, or employment. Accordingly, it is my opinion that such statute has no application to the question here considered, and should work as no bar to an official court reporter, who serves as special court reporter of another circuit, receiving compensation for the services rendered as special reporter."

In view of the above quoted excerpt from the opinion of this office and the construction therein placed on Title 41, Section 150, supra, it is my opinion that such statute has no application to the question presented in your request.

An hourly employee of the State Docks and Terminals who serves as a member of a county board of registrars is entitled to such compensation as provided for by law for serving as a member of such board, and the receipt of such compensation does not bar the employee from receiving further compensation that he may be entitled to for duties actually performed for the State Docks and Terminals on an hourly basis. However, such employee is entitled to compensation from the State Docks and Terminals only for the time actually spent on the job.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1948.

Hon. J. E. Bryan, Superintendent,
County Board of Education,
Jefferson County,
408 Courthouse,
Birmingham 3, Alabama.

County Boards of Education—Funds.

1. Act No. 459, Local Acts 1947, page 321, providing relief for one injured by reason of negligence of an agent, servant, or employee of the Jefferson County Board of Education, is valid and constitutional.

2. The amount awarded as compensation for such injury should be paid from funds appropriated to the Jefferson County Board of Education by the State under authority of Section 260, Constitution of Alabama 1901, including funds accruing to such Board under the provisions of the Minimum Program Fund.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of February 9, 1948, is as follows:

"On September 25, 1947, the Governor approved House Bill 883, which directs the Jefferson County Board of Education to pay to Sam Francis Brennan, Jr., the sum of \$500.00, for personal injuries received by him. This party was a student at one of the county schools, and while in the manual training room, a bandsaw came off or became disconnected in some way, and this party received his injuries. The Act in question provides among other things, as follows:

"The said sum of money, as aforesaid, is to be paid to the said Sam Francis Brennan, Jr., out of such monies as may be constitutionally available."

"Certain doubts have been raised, as to the constitutionality of the Act, and some confusion exists, as to the proper meaning of the above excerpt. Before further consideration is given by this office to the payment of the sum specified in the Act, I would like very much to have your opinion on the following:

"1. Is the Act in question constitutional and does it violate Sections 257, 258, 259, or any other Section of the Constitution of Alabama of 1901?

"2. What is the meaning to be construed to the direction of the Legislature above set out, that the amount provided in the Act shall be paid out of such monies as may be constitutionally available?

"In connection with the first numbered inquiry, I call your attention to 47 American Jurisprudence, Sec. 83, Page 357; Sec. 92, Page 363, which holds that the Legislature itself, the fountainhead of matters educational, cannot divert school funds to other uses. We have also been informed that our Supreme Court has held that the power to regulate and control the public schools is confined to the Legislature. See *Dickinson v. Cunningham*, 140 Alabama 527, 37 So. 345. It has also been held by the Supreme Court that public school funds may be used only for the purpose of supporting and maintaining the public schools and that an injunction would lie to prevent paying out any money from the Alabama Special Educational Trust Fund for any purpose other than educational purposes. See *In Re: Opinions of the Justices*, 229 Ala. 98, 155 So. 699; *Hall v. Blan*, 227 Ala. 64, 148 So. 601.

"With regard to the second inquiry, the County Board of Education has adopted a budget for the school year 1947-48, as required by the school law. All anticipated funds to the School Board have been appropriated in the budget to the payment of teachers' salaries and for the operation and maintenance of the public schools. The School Board did issue some warrants for building purposes only, and of course, such funds are pledged solely for that purpose. Under the present status of our budget, we do not have any funds available for the purpose of paying the amount stipulated in the Relief Bill, unless of course, such amount is paid from funds appropriated in the budget to the payment of salaries or for the operation and maintenance of schools.

"In view of the above, and in further view of the fact that we have been advised as to the probable unconstitutionality of the Act, I would appreciate your prompt advice as to whether the School Board has the authority to pay the amount specified in this Relief Bill."

The act to which you refer in your request is Act No. 459, Local Acts 1947, page 321, and, as stated by you, said act authorizes and directs the Jefferson County Board of Education to pay to one Sam Francis Brennan, Jr., the sum of five hundred dollars as compensation for injuries sustained by said Brennan as a result of the negligence of the agents, servants, or employees of the Jefferson County Board of Education, said injuries resulting in the loss of the sight of an eye of said beneficiary.

In my opinion, said act violates none of the provisions of the Constitution or statutes of the State.

County school funds are state funds subject to state control, and are to be expended only by authority of the state. *Montgomery v. State*, 228 Ala. 296, 153 So. 394.

The Supreme Court of Alabama has likewise held on numerous occasions that the Legislature can constitutionally appropriate public funds,

state, county and city, for the discharge of a moral duty, even though there is no legal duty. *Board of Revenue v. Puckett*, 227 Ala. 374, 149 So. 850; *Cullman County v. Blount County*, 160 Ala. 319, 49 So. 315; *Moses v. Tigner*, 232 Ala. 457, 168 So. 194; *Board of Revenue v. Hewitt*, 206 Ala. 405, 90 So. 781; *Aildredge v. Dunlap*, 240 Ala. 27, 197 So. 36; *Hawkins v. State Board of Adjustment*, 242 Ala. 547, 7 So. 2d 775.

In the case of *Webb v. McGowin*, 232 Ala. 374, 168 So. 199, the Supreme Court took occasion to observe, in effect, that the above cited cases do not justify such a use of public funds to compensate one for some nice ethical obligation, so as to perform a courteous or generous act, but that the moral obligation to sustain such an appropriation must be to satisfy a just claim for financial aid which in good faith and good morals ought to be paid, but for which there is no legal liability or obligation. In other words, expenditure of public funds should only be made under circumstances where in fairness the State might have been asked to respond, that is, where something more than a mere gratuity is involved.

In my opinion, such is the instant case. The claim here considered and the award here made is one, in my opinion, which in good faith and good morals should be paid, but for which there is no legal liability or obligation. In my judgment, something more than a mere gratuity is here involved.

As regards the construction to be accorded that provision of Act No. 459, *supra*, to the effect that the amount therein awarded as compensation should be paid "out of such moneys as may be constitutionally available." I call your attention to the decision of the Supreme Court of Alabama in the case of the *First National Bank of Birmingham v. Walker County Board of Education*, 243 Ala. 576, 11 So. 2d 297. In that case, the Court considered an act of the Legislature appropriating funds of the Walker County Board of Education for an alleged obligation similar in nature to that here considered. After pointing out that money raised by local taxation, authorized by the Constitution for local school purposes cannot be diverted to any other purpose, the Court stated as follows:

"The Act of 1939, *supra*, makes the warrants payable 'out of any funds in the hands of the Walker County Board of Education.' So that their payment is not limited to such funds as the legislature may by act supply, by authority of section 260, Constitution, over and above the school tax there prescribed, or from the special educational trust fund. But it includes school funds in the hands of the board raised by local school taxes, authorized by the Constitution, devoted to school purposes. Sections 256, 257, 258, 259, 260, 269, and amendment number 3 to the Constitution."

In my opinion, the material difference between the act considered in the *Walker County* case, *supra*, and in the instant case, is the language employed by the lawmakers in making the appropriation of the school

funds. As pointed out by the Court in the above case, the language there employed was too broad in its scope in that it included funds of the County Board of Education raised by local taxation for local school purposes, which funds cannot be diverted to any other purpose.

It cannot be doubted that the Legislature at the time of passage of the 1947 Act here considered (Act No. 459, *supra*), had knowledge of and took into account the decision of the Supreme Court in the Walker County case, above cited, and for that reason did not authorize payment of the award therein made from any funds that might be in the hands of the Jefferson County Board of Education, but rather restricted such expenditure to payment from "such moneys as may be constitutionally available." In so doing, it is my opinion that the defect pointed out in the act considered in the Walker County case does not here exist, and that as a consequence thereof, Act No. 459 is valid and constitutional.

It should also be pointed out that it is an accepted rule of statutory construction, many times announced by the Supreme Court of the State, that in construing an act, it is one's duty to give to such act a construction which will sustain its validity, if it may be reasonably so construed, and that the legislative body is presumed to intend that legislative acts shall not violate the Constitution, and be utterly void. Any reasonable construction will be given to effectuate such intent. *Dixon v. State*, 232 Ala. 150, 167 So. 349; *State v. Merrill*, 218 Ala. 149, 117 So. 473; *Dillon v. Hamilton*, 230 Ala. 310, 160 So. 708; *Stone v. State ex rel. Courtney*, 233 Ala. 239, 171 So. 362. I find no difficulty in according to Act No. 459, *supra*, a valid construction and, therefore, must hold that such act was validly and constitutionally enacted.

It is, therefore, my opinion that the Jefferson County Board of Education must abide by the provisions of Act No. 459, *supra*, and pay to the beneficiary of such act the amount therein awarded as compensation, such money to be paid, not from monies in the hands of such Board raised by local taxation for local school purposes, which funds cannot be diverted to any other purpose, but from funds appropriated by the State to such Board under the authority of Section 260, Constitution of Alabama 1901, including funds accruing to the Board under the provisions of the Minimum Program Fund.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 16, 1948.

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

Counties—Tax Assessors—Tax Collectors.

The county may legally purchase city directories for the offices of the tax assessors and tax collectors.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of March 9, 1948, is as follows:

"Today I made requisition on the Board of Revenue and Road Commissioners of Mobile County for a new City Directory which we use constantly to locate places of business and in sending out registered letters covering delinquent tax payers and which is extensively used at all times.

"The Clerk of the Board of Revenue and Road Commissioners advised me that, under an opinion dated November 4, 1947, addressed to Honorable J. A. Logue, Judge of Probate, Houston County, Dothan, Alabama, which states that the Court of County Commissioners does not have the authority to purchase directories for any office.

"As the offices in Mobile County are on a salary basis instead of a fee basis and as this directory is as necessary to this office as any printed forms or books or stationery the writer wonders if under paragraph 36 and paragraph 194, Title 51, if the Board of Revenue and Road Commissioners could not purchase said directories for the offices of the Tax Assessor and the Tax Collector under the above mentioned paragraphs and titles.

"The writer would most certainly appreciate an opinion as quickly as possible due to the fact that this time of the year when we are out making demands and serving notices on all delinquent tax payers."

It is my opinion that your inquiry should be answered in the affirmative.

Title 51, Section 36, Code of Alabama 1940, reads as follows:

"§ 36. Duty of county officials to furnish assessor and collector with books, blanks and stationery.—It shall be the duty of the courts of county commissioners or boards of revenue of the several

counties in this state to supply the tax assessor, tax collector and such other tax officials or agents whose duty it is to assess and value property for taxation under this title, with all necessary books, stationery and printed blanks for the proper conduct of their several offices."

In my opinion, the directory referred to in your inquiry is within the meaning of the term "necessary books" in the above section. Such a directory would greatly expedite the performance of the duties of the subject offices. See Title 51, Section 194, Code of Alabama 1940. For this reason such directories may be legally purchased by the county for use in the offices of the tax assessor and tax collector. Cf. Quarterly Report of Attorney General, Volume 34, page 84.

This opinion is not inconsistent with the previous opinion of this office (Quarterly Report of Attorney General, Vol. 49, page 93) referred to in your inquiry. That opinion merely held that a county could not purchase city and county directories for the use of the various offices in the county courthouse in general.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 16, 1948.

Honorable J. D. Steele, Member,
Board of Education,
Greene County,
Eutaw, Alabama.

Schools—County Boards of Education—Libraries.

County boards of education may make appropriations for libraries for public schools, under the provisions of Title 52, Section 376, Code of Alabama 1940. An appropriation to a county library which furnishes a large number of books at regular intervals to the public schools of the county is tantamount to an appropriation for libraries for the public schools of the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of July 2, 1948, is as follows:

"The Greene County Library was founded eighteen years ago as a public service to the people of Greene County. Its governing body is the Greene County Library Association which is made up of

representative members from the various governmental organizations, service and social clubs, and other similar organizations in the county. The Probate Judge, The Mayor of Eutaw, and other public officials are ex-officio members thereof.

"Since its foundation eighteen years ago, the Greene County Library has regularly furnished library books and library service to all of the Greene County public schools. This was accomplished largely by sending out boxes of books at regular intervals to the various schools in the county. The circulation of these books in the schools for the past year was 4455, the Eutaw Grammar School leading with a circulation of 3693. The Eutaw Grammar School has no library. With the exception of a small, inadequate library at the high school, there is no school library in the county.

"In order to assist the Greene County Library in furnishing the juvenile books suitable for circulation in the schools of Greene County, including the Greene County High School, the Greene County Board of Education unanimously voted to appropriate the sum of \$500.00 to the Greene County Library for this purpose. Some question has been raised as to the legality of this action.

"As a member of the Greene County Board of Education, I am hereby requesting your opinion as Attorney-General as to the legality of the appropriation made by the Greene County Board of Education to the Greene County Library for the purposes and under the circumstances above set forth.

"I will appreciate your early response as this matter has been pending for some time."

In answer to your inquiry, it is my opinion that the appropriation made by the Greene County Board of Education to the Greene County Library for the purposes and under the circumstances set forth in your inquiry is legal.

County boards of education may make appropriations for libraries for public schools under Title 52, Section 376, Code of Alabama 1940.—Quarterly Report of Attorney General, Volume 14, page 286. See also *Gray v. State*, 231 Ala. 229, 164 So. 293. The appropriation to the Greene County Library for the purposes and under the circumstances set out in your inquiry, in my judgment, is tantamount to an appropriation for libraries for the public schools of the county.

The above is not in conflict with an opinion of this office found in Quarterly Report of Attorney General, Volume 20, page 371, as in that opinion the county library was in no way connected with the public schools.—Cf. Quarterly Report of Attorney General, Volume 32, page 15.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 22, 1948.

Hon. L. L. Thompson,
Mayor, Town of East Brewton,
East Brewton, Alabama.

Municipalities—Auditors—Examiner of Accounts.

1. Under ordinary circumstances, a State official does not have authority to order an audit of the books of a city or town operating under the mayor-council form of government, unless such city or town fails to submit a certified audit for two years. Title 55, Section 151, Code of Alabama 1940; Title 37, Sections 444 and 445, Code of Alabama 1940.

2. A municipality operating under the mayor-council form of government, failing for two years to submit a certified audit under the provisions of Title 55, Section 151, Code of Alabama 1940, may be audited by State examiners without a request from the city.

3. A city or town operating under a commission form of government may have its books examined at any time upon order of the Governor. Title 37, Section 81, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 10, 1948, is as follows:

"I would like to request a ruling from you on the following question:

"1. Does any State Official have authority to order an audit on the books of a City or Town which is incorporated under the laws of the State of Alabama and which is operated under the Mayor-Council form of Government without a specific request for such an audit by the Mayor and/or Council.

"2. If your answer to number one is 'yes' please advise which officials have the authority to order the State Examiners to make such an audit.

"An early ruling on this matter is respectfully requested."

In my opinion, no State official, under ordinary circumstances, has authority to order an audit of the books of a city or town operating under the mayor-council form of government without a request from the city or town. There is an exception to the above conclusion when the

city or town has failed for a period of two years to have an audit made.

Since my answer to your question number one is no, it is unnecessary to answer your question number two.

In the absence of an investigation by a grand jury, or by other law enforcement officers, it is my opinion that no State official has authority to order an audit of the books of a city or town operating under the mayor-council form of government.

I say this for the reason that Title 37, Sections 444 and 445, Code of Alabama 1940, provide as follows:

"§ 444. Reports to be made to the mayor.—The mayor shall require reports to be made to him by any officer of the city or town at such times as he may direct, or as may be prescribed by the council, and shall, at least once in every six months, make a statement to the council in writing of the financial condition of the town or city, showing particularly all temporary floating indebtedness and for what created, and the steps he proposes to take for the protection of the credit of the city or town."

"§ 445. Accountant, expert, employed; duties of.—In cities and towns the mayor shall at least once a year, appoint an expert accountant who shall make an examination in detail of all books and accounts of the city officials to cover the period since the preceding examination, and make a full report thereof in writing, under oath, to be submitted to the council at its first meeting after the completion of such report, and the same shall be spread upon the minutes of the council, but the same person shall not be appointed or authorized to make such examinations twice in succession. For his services said accountant shall be paid such sum as may be agreed upon."

It will be seen, therefore, that an annual audit is required of the city, but such audit is to be performed by an expert accountant under the direction of the city or town.

This annual audit above referred to and required by the statutes must be certified to and presented to the Department of Finance each year. Title 55, Section 151, Code of Alabama 1940. If this annual certified audit is not presented to the Department of Finance each year, and no audit of the books and records of the city or town has been made for a period of two years, the Department of Finance is authorized to make an audit, or require that an audit be made. Title 55, Section 151, Code of Alabama 1940.

Therefore, if the city or town having a mayor-council form of government employs an accountant and submits a certified audit to the State every year, I do not find that a State official can order an audit to be made. When the city or town fails to have an audit made for

two years, an audit can be ordered under the provisions of Title 55, Section 151, Code of Alabama 1940.

It should here be stated that when a municipal corporation operates under a commission form of government, Title 37, Sections 35, et seq., Code of Alabama 1940, the Governor may at any time have all books and accounts of the city examined by a State examiner. Title 37, Section 81, Code of Alabama 1940. It should further be stated that this opinion, in holding that no State official has authority to require the audit of the books of a municipal corporation operating under the mayor-council form of government, does not discuss the subject of an investigation of municipal books by a grand jury or by law enforcement officers. Such an investigation or audit would be required only under extraordinary circumstances. See Title 30, Section 77, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 22, 1948.

Hon. R. R. Wright,
Judge of Probate,
Marion County,
Hamilton, Alabama.

Elections—Contest—Absentee Ballots.

1. The provisions of Act No. 478, General Acts 1945, page 711, prescribing the manner by which absentee ballots shall be furnished those persons qualified to cast such ballots in any election, are formal and directory only, and failure of any officer or official to comply with the provisions of such act in this respect, although subjecting such official to the penalties prescribed therein, does not invalidate the ballot cast if the person casting such ballot is in all respects qualified to participate in such election by the casting of an absentee ballot.

2. Opinion of the Attorney General found reported in Quarterly Report of Attorney General, Volume 40, page 14, modified to conform with the views expressed herein.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of July 20, 1948, is as follows:

“As Probate Judge of Marion County during the last Democratic Primary held June 1, 1948, it was my duty to send out absentee ballots to those who requested same.

"It has been called to my attention that certain of these applications were either deficient in not being filled out fully, and in some instances it turns out that the applications were not actually signed by the electors.

"I went ahead on receipt of application and mailed out absentee tickets to the voters whose names appeared on the application presented me.

"My question is, if the qualified elector actually signed and voted the absentee ballot, is his vote illegal, if the evidence later shows on contest that the application was not signed by the said elector?

"I would appreciate a prompt opinion, if at all possible.

Your question addresses itself to the validity of the ballot cast by an absentee voter in a primary election where the request of such voter for the absentee ballot was not fully filled out, or in certain instances where such requests were not actually signed by the electors furnished such ballots.

In my opinion, a ballot cast by an absentee voter in a primary election is a valid ballot and should be recorded and counted if such elector is fully qualified under the statutes governing the casting of absentee ballots to participate in the election concerned. This is true even though the request made by the elector for such ballot is not complete in all respects, or if such request was signed by a person other than the elector receiving the ballot.

The law of this State governing the casting of absentee ballots in all primary, general and municipal elections is set out within Act No. 478, General Acts 1945, page 711. This act sets out the electors eligible to participate in any election by the casting of absentee ballots and the manner in which such absentee ballots shall be obtained, prepared and forwarded to the proper officials. Such act imposes upon certain of the officials of the various counties of the State, including the Judge of Probate, duties in connection with the administration of the absentee ballot law. Section 4 (a) of Act No. 478, supra, provides with reference to application for absentee ballots as follows:

"Every application for an absentee ballot must be made by the voter appearing in person and signing the same in the presence of the probate judge, or other person authorized herein to act in his stead when he is disqualified, unless the voter is a member of the armed services of the United States or is temporarily employed and residing outside of the county of his legal residence. The absentee voter shall be identified properly by the probate judge before whom he appears as being the person he claims to be, and every absentee voter, whether he applies in person or in writing, shall certify in writing in addition to any other information required here-

in, his residence address, his business address, his occupation, and the name of his employer."

Section 7 of such act provides that the Probate Judge of each county, or the person authorized to act in his stead, in which applications are made for absentee ballots shall make, as applications are filed for such ballots under this act, an accurate list of the names, residences, and polling places of voters applying for absentee ballots, which list and the written applications for the absentee ballots shall be kept for sixty days after the election, open to inspection by the public. It is also provided that the official receiving absentee ballots shall make, as the envelopes containing ballots are received by him, a list showing the dates when received and the names of the absentee voters casting such ballots, indicating the precinct in which each of such voters are qualified to vote, it being further provided that on the fourth day before the election, this official shall publish a list of those electors casting absentee ballots in the election.

With regard to the casting and recording of absentee ballots, Section 6 of such act provides, in part, that

"* * * If the name of such absentee voter appears on the official list of qualified voters of the county, and if the envelope containing the absentee vote was postmarked or marked received by the proper official not less than five days prior to election day, the election officers shall check his name off the official voting list and cause the ballot to be duly and properly recorded. All votes found to be legal votes shall be handled in all respects as if the absentee voter were present and voting in person * * *"

Section 13 (a) of such act prescribes the penalties to be imposed upon persons violating any of the provisions of the absentee ballot law as set out therein, it being provided that any judge of probate, mayor, or other chief executive officer of a municipality, or any person acting in their stead, as herein provided, who shall deliver or cause to be delivered an absentee ballot to any absentee voter without first receiving a written application therefor, signed by the voter, shall be fined not less than \$100.00 nor more than \$500.00. Subsection (c) of Section 13, supra, provides penalties for any person willfully violating any of the provisions of the absentee ballot law.

It has been held by the Supreme Court of this State that those provisions of the election law which are not essential to a fair election will be construed by the courts to be formal and directory merely, unless the statute itself declares them to be essential. Also, that provisions in election statutes are not rendered mandatory as to the electors by the fact that officers of the election are subject to criminal liability for their violation. *Montgomery v. Henry*, 144 Ala. 629, 39 So. 507.

In the case of *Lee v. The State*, ex rel. Locke, 49 Ala. 43, the Supreme Court of Alabama had occasion to consider the question of the

validity of ballots cast in an election in which certain irregularities concerning the conduct thereof arose. In its opinion, the Supreme Court made reference to a case decided by the courts of the State of New York considering a like question and there observed that in deciding said questions the court declares that statutes directing the mode of proceeding by public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute. After setting forth in detail the alleged irregularities arising, the court made the following statement:

"The principle settled in that case is, that if it does not appear that any illegal votes were received, or any legal votes rejected at the election, and there is no evidence of fraud in conducting the polls or canvassing the votes, such and like irregularities will not render the election void. That case, it seems to us, presents the view that ought to be taken in disposing of the present case and all cases of this sort. It establishes the principle, and we think correctly, that an election ought not to be held invalid on account of irregularities, where no illegal votes are alleged to have been received, and no legal votes to have been rejected, and where no misconduct is shown, calculated to prevent a fair, free, and full exercise of the elective franchise. We are not prepared to hold that the election at said box number one ought to be declared invalid on account of the irregularities at said box; no fraud being shown, and the election appearing to have been in fact fairly conducted on the part of the persons who actually managed and conducted it. It is fair to presume, we think, as nothing to the contrary is shown, that the said election was properly conducted in all its essentials, and that the will and choice of the lawfully qualified voters were fairly and freely expressed, without let or hindrance. To declare said election invalid on account of the ignorant, but no doubt honest mistakes and irregularities of the inspectors, or of those who acted as such, would be to visit their mistakes upon those who were not in any wise the cause of or responsible for them, and would also be in violation of sound public policy."

Again, in the case of *Montgomery v. Henry*, supra, the Supreme Court of Alabama had occasion to consider the question here involved and the Court there observed that:

"The right to vote and have the vote counted should not be taken away by any doubtful construction of a statute, and before the voter should be shorn of the privilege it must be clear that, under the circumstances then existing the legislature intended such to be the case."

"We deem the doctrine well settled, that statutes tending to limit the citizen in the exercise of the right to vote and of having the vote counted should be liberally construed in his favor. This doctrine, we think, should be applied in construing the statute before us.—*Buckner v. Lynip*, 30 L. R. A. (Nev.) 354, 41 Pac. Rep. 762;

Owens v. State, 64 Tex. 500; State v. Saxon,,18 L. R. A. (Fla.) 721, 12 So. Rep. 218.

"The courts in order to give effect to the will of the majority, and to prevent the disfranchisement of legal voters have uniformly held those provisions to be formal and directory merely, which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself. In McCary on elections, § 190, the rule is stated as follows: 'If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and consideration touching its policy or impolicy must be addressed to the legislature. But if as in most cases, the statute simply provides that certain acts or things shall be done within a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.'—§ 225 and citations is note 2."

In its opinion in the *Montgomery* case, *supra*, the Court took note of the fact that text writers on this subject have expressed the view that in general those statutory provisions which fix the day and the place of the election and the qualifications of the voters are substantial and mandatory, while those which relate to the mode of the procedure in the election, and to the record and the return of the results, are formal and directory only. The Court in this opinion again reaffirmed the principles announced in the *Lee* case, *supra*, that:

"Statutory provisions relating to elections are not rendered mandatory, as to the people, by the circumstances that the officers of the election are subjected to criminal liability for their violation. The rules prescribed by the law for conducting an election are designated chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result. Generally such rules are directory, not mandatory, and a departure from the mode prescribed will not vitiate an election if the irregularities do not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from them.' Judge Post, speaking for the supreme court of Nebraska in the case of *Wagganer v. Russell*, 15 L. R. A. 740, 51 N. W. Rep. 465, said: 'The view expressed by these authors has the support of the great majority of cases in this country and England. In fact, we are not aware that there is to be found in the reports any diversity of opinion on the subject. * * *'"

Numerous authorities are cited by the Court in support thereof.

I deem the opinion of the Supreme Court in the *Montgomery* case, *supra*, to be particularly apropos to the questions presented by your inquiry and wish to incorporate herein, by reference thereto, all the reasoning and logic of the Court announced in that opinion, which in the interest of brevity, will not be further quoted here. I have checked the opinion in this case and I find that it has not been overruled or amended by any subsequent opinions of the Court, but instead has been cited with approval since the date of its rendition in numerous more recent decisions. Other decisions of the Supreme Court testifying to the correctness of the view announced herein include the cases of *Pope v. Howle*, 227 Ala. 154, 149 So. 222; *Garrett v. Cunninghame*, 211 Ala. 430, 100 So. 845, and *Rainwater et al v. State ex rel. Strickland*, 237 Ala. 482, 187 So. 484.

Applying the principles of law announced in the *Montgomery* case, and those other cases above cited, to the instant situation, it is my opinion that that portion of the absentee ballot law of the State prescribing and setting forth the duties of certain officials, including the Probate Judge, in connection with the administration of such law is formal and directory only, and does not go to the validity of the ballot cast by such absentee voter. Nowhere within such law do I find any provision to the effect that failure of these officials to perform the duties imposed upon them, or misconduct of such officials in the performance of their duties, shall invalidate the ballot cast by such elector, if he be in all other respects qualified to participate in such election by the casting of an absentee ballot. In fact, the converse is shown by that portion of Section 6 of Act No. 478, *supra*, herein quoted to the effect that if the name of such voter appears on the official list of qualified voters and if his absentee ballot be received within the time prescribed by law, the ballot shall be duly and properly recorded.

As above noted, certain penalties attach to those officials failing to perform their duties in the administration of the absentee ballot law, and to any person guilty of willful violation of any of the provisions of such law. However, it is aptly pointed out in the *Montgomery* case, above cited, that this in itself does not render the provisions of the absentee ballot law mandatory as to the electors participating therein.

It is, therefore, my opinion that those absentee ballots cast by duly registered and qualified electors, in all other respects qualified to participate in such election by the casting of an absentee ballot, should not be held invalid solely because the request for such ballot was improperly made.

The views expressed herein are in no conflict with the holding of a former opinion of this office rendered to the Honorable W. W. Hill, Judge of Probate, Montgomery County, Alabama, under date of August 1, 1945 (Quarterly Report of Attorney General, Vol. 40, page 14), regarding the duties of the Judge of Probate under Act No. 478, *supra*. However,

that portion of said opinion where it is stated that the voter who fails to certify the information required upon application for an absentee ballot has no claim to the privilege of casting such ballot is not a clear or correct statement of the law in this regard. Accordingly, that portion of such opinion is modified to conform to the views expressed herein.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 22, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Roads—Counties—Courts of County Commissioners.

1. It is within the discretion of the county governing body of Marengo County to establish a private road to a privately owned radio station in the county, but said county governing body does not have authority to construct said road.

2. Quarterly Report of Attorney General, Volume 48, page 145, overruled and withdrawn.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of November 14, 1947, is as follows:

"Under date of August 27, 1947, you rendered an official opinion addressed to Hon. H. K. Lewis, President, Board of Revenue, Marengo County, Lindeh, Alabama. This opinion authorizes the construction of a private road to a privately owned radio station. The question as to source of funds for this project was unasked and consequently unanswered.

"You are respectfully requested to amplify this opinion by considering the question of use of public funds for the project in question.

"Should you rule that public funds may be used, please advise as to the effect, if any, such ruling would have when considered in connection with Section 94 of the Constitution.

"If you rule that the expenditures may be made from public funds and that such ruling would not be in conflict with Section 94 of the Constitution, from what fund or funds may the expenditures be legally made?

"I have reviewed the provisions of Section 215 of the Constitution, Title 23, Sections 43 and 47, Title 51, Section 657, which treat on funds which may be used for public roads.

"Other County funds are sales tax, liquor tax and general fund. The first two are earmarked for Health, Welfare and Agricultural Extension expenditures, and your office in Volume 31, page 54, ruled that expenses of members of county governing bodies attending meetings of the National Association of County Officials could not be paid from the general fund. Biennial Report of 1936-38, Page 472, prohibits transfer of funds from general fund to road and bridge for the purpose of purchasing road machinery and supplies, unless there exists a surplus in the General Fund."

After reconsidering my opinion to Hon. Y. K. Lewis, President, Board of Revenue, Marengo County, Linden, Alabama, under date of August 27, 1947 (Quarterly Report of Attorney General, Vol. 48, page 145), in which I held that it was within the discretion of a county governing body to construct a private road to a privately owned radio station in the county, I find that said opinion was in error. It is now my opinion that a county governing body has authority to establish a private road to a privately owned radio station, which means to lay out the road, but does not have authority to construct a private road to a privately owned radio station.

Title 23, Section 65, Code of Alabama 1940, provides as follows:

"Establishment of private roads.—Private roads may be established by the court of county commissioners or other governing body by whatever name called, on the application of any person, such roads not to exceed fifteen feet in width, and to be opened and kept in repair by the person on whose application they are established without exemption on public roads."

It is stated of the word "established," 30 C. J. S., at page 1232, in that as "applied to a road or private way the term means 'laid out' and, applied to a public road, completed and open to public travel."

In the case of *Cleckler v. Morrow*, 150 Ala. 524, 43 So. 784, our Supreme Court said:

"In a proceeding to establish a public road, the adversary party to the landowner or owners is the commissioners' court of the county.—*Commissioners' Court of Lowndes County v. Bowie*, 34 Ala. 461, and the cases cited. Where a public highway is established, the compensation to the landowner is paid by the county, and the road is under the control and supervision of the court of county commissioners.—Section 2443 et seq. of Code of 1896. Where a private road is established, the compensation to the landowner must be paid by those making an application to have it established, and

it must be opened and kept in repair by them. Section 2497 of Code of 1896."

The opinion to Hon. Y. K. Lewis, supra, insofar as it conflicts with this opinion, is hereby overruled and withdrawn, and this opinion is substituted in lieu thereof.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 23, 1948.

Hon. Winston Stewart,
Judge of Probate,
Coosa County,
Rockford, Alabama.

County Funds—Radio Broadcast.

County governing body of Coosa County under Title 12, Section 12, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, approved July 6, 1945, may expend county funds to pay for radio broadcast, advertising the county, at the Fish Pond Community Centennial celebration.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of June 18, 1948, is as follows:

"The first Sunday of May 1949 the Fish Pond Community of Coosa County will celebrate its 100th birthday commemorating its all day singing.' In this event the history will be given, together with other programs, for the day. In other words, the County of Coosa will be advertised over a radio station.

"Does the county have authority under Title 12, Section 12, subdivision 22, to pay for this advertising?

"Does the county have authority to make a contribution to this Community for this purpose?"

In my opinion, your first question should be answered in the affirmative.

This office has held: The Commissioners Court has authority to contribute a reasonable amount to the Alabama Sportsman to advertise the county. See Biennial Report of Attorney General, 1926-28, page 113.

The county has authority to advertise its resources in a newspaper or other periodical and charge its cost to the county general fund. Biennial Report of Attorney General, 1926-28, page 301.

Act No. 344, General Acts 1945, page 560, provides, in part, as follows:

"Section 1. That Section 12, Title 12, Code of Alabama 1940 be and is hereby amended so as to read as follows: 'Section 12. Authority of Court.—The court has authority: * * * (22) To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. The court is authorized to enter into contracts with any person, firm, corporation or association to carry out the purposes set forth in this subdivision. * * *.'"

It is my opinion that to broadcast the speech of a silver-tongued orator at the Fish Pond Community Centennial, who gives the history of the county and the advantages of living in the county, is an effective way of advertising the resources of Coosa County.

I refer you to the case of *Stone, County Treasurer v. State ex rel. Mobile Broadcasting Corporation*, 223 Ala. 426, 136 So. 727, relative to the right of the county governing body to expend the county funds for the purpose of advertising the county.

I do not believe it is necessary at this time to answer your second question.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 23, 1948.

Hon. G. V. Dismukes, Mayor,
City of Prichard,
Mobile County,
Prichard, Alabama.

Municipalities—General Elections.

1. Candidates for election to the city council of the City of Prichard, to be elected at the general municipal election to be held on the third Monday in September 1948, pursuant to Act No. 465, General Acts 1945, are not required to file their declaration of candidacy for designated places on the council, but they run in the field without such designations.

2. The candidate for Mayor of the City of Prichard who, in the general and municipal election to be held on the third Monday in September 1948, shall receive the largest number of legal votes (a plurality) shall be declared elected to the office of mayor.

3. The five candidates for membership on the city council of the City of Prichard who shall receive the largest number of legal votes (a plurality) at the general election to be held on the third Monday in September 1948, shall be declared elected to such membership.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of July 14, 1948, is as follows:

"The Mayor and City Council of the City of Prichard, Alabama respectfully request your official written opinion as to the following question of law connected with their official duties as such public officers.

"The City of Prichard has a population of more than 6,000 according to the 1940 federal census. Pursuant to Section 426, Title 37, Alabama Code of 1940, the City Council adopted more than six months prior to the next General Municipal election on September 20, 1948, a resolution by more than two-thirds vote providing that the City Council shall consist of five members to be elected from the city at large.

"Are candidates for the city council of the City of Prichard at the general municipal election to be held September 20, 1948, required to file for designated seats on the said council according to Act No. 644, General Acts of 1939, appearing on pages 1008-1009 of the General Acts of 1939 and approved July 10, 1939, now codified as Section 30, Title 37, Alabama Code of 1940 as amended; or do such candidates file only for membership on the said city council, and run in the general field as provided by Acts No. 464 and 465 of the General Acts of 1945 appearing on pages 698-699-700-701 and 702 of the General Acts of 1945, now codified as Sections 34 (1) thru and including 34 (19), Title 37, Alabama Code of 1940 as amended, which such acts purport to repeal Sections 26-27-28-29-30 (as amended by Act No. 644, General Acts 1939, Page 1008, approved July 10, 1940), 31-32 and 33, Title 7, Alabama Code of 1940, and to provide for the method of all municipal elections in Alabama.

"And if the answer to the preceding paragraph be to the effect that such election is governed by the Acts of 1945 referred to, then is no majority required for election for members of the Council, but is a simple plurality sufficient?

"Your prompt reply to this request will be of great value not only to this municipality but to other municipalities in Alabama which are faced with a similar problem."

It is my opinion that the persons who qualify as candidates for membership on the city council of the City of Prichard at the general election to be held on the third Monday in September 1948, run in a field and not for designated positions or places on said council.

Between July 10, 1940 and July 6, 1945, at which latter time Act No. 464, General Acts 1945, page 698, was approved by the Governor and became a law, candidates for membership on city councils in municipalities with one thousand or more inhabitants were required to qualify for places or positions when running in a general election. This requirement was made effective by Act No. 644, General Acts 1939, page 1008, approved July 10, 1940, amending Section 1883, Code of Alabama 1923. The legislature by Act No. 464, supra, repealed Section 1883, Code of Alabama 1923, as amended by Act No. 644, supra. Section 1883, supra, was codified as Title 37, Section 30, Code of Alabama 1940.

Embraced in Act No. 465, General Acts 1945, page 699, is Section 16 reading as follows:

"Section 16. Within three days after the delivery of the boxes, as hereinabove required, the council shall proceed to open the same and canvass the returns, and the persons who shall have received the largest number of legal votes for the respective offices to be filled at such election, shall be declared elected to such offices, and a certificate of election shall be given to such persons by the council, or a majority of them, which shall entitle the persons so certified to the possession of their respective offices immediately upon the expiration of the term of their predecessors, as provided by law. In the event of a tie vote between two or more persons in said election, for the same office, the council shall order a new election not later than thirty days thereafter, at which election said parties shall run off the tie vote, and the person receiving the highest number of votes shall be declared elected. In the event that all opposition is withdrawn to a candidate receiving a tie vote, then no second election need be held, and such candidate shall receive a certificate of election."

The afore-quoted section is identical with Section 1883, Code of Alabama 1923 (codified as Title 37, Section 30, Code of Alabama 1940) prior to its amendment by Act No. 644, supra. The amendment added to said section 1883 the following provisions:

"Provided, however, that in all incorporated municipalities which now have, or which may hereafter have, a population of one thousand or more inhabitants as determined by the Federal census the procedure shall be as follows: If at such election any candidate for office in said election has received a majority of the votes cast for

that office, then such candidate shall be declared elected to such office and a certificate of election shall be given to such person by the council or other city governing body, which shall entitle the person so certified to the possession of such office immediately upon the expiration of the term of his predecessor as provided by law. If no candidate receives a majority of all the votes cast in such election for any one office or offices for the election to which there were more than two candidates, then, in such event, the council or other city governing body shall, not later than fifteen days after such election, order a new election to be held not later than twenty days after such election, at which election the two candidates receiving the highest number of votes in the first election for such office or offices shall run and the person receiving the highest number of votes shall be declared elected. Provided that whenever and wherever two or more candidates for municipal offices of the same name (constituting a group) are to be elected, each of said places to be filled shall be designated by number by the council, and each candidate for such offices in the announcement of his candidacy shall designate the number of the office for which he is a candidate. The same person shall not be a candidate or permitted to file his declarations for more than one of such places and should a run-off be necessary, such candidate may enter the election for only the place for which he announced in his original declaration, and no ballot shall be counted for any candidate in any election, whether original or a run-off, except for the place and number for which he announced in his declaration filed with the legally constituted authorities to receive and file declarations of candidacy. Each of said places to be filled shall be designated by number according to seniority in service of the existing incumbents. If there is no such seniority, they shall be numbered in alphabetical order of the names of the incumbents. In the event either of the two candidates receiving the highest number of votes in the first election shall determine not to enter the run-off election herein provided for, he shall, as soon as possible, and not later than ten days after the holding of the first election, certify his declaration to enter such second election to the council or other city governing body and upon the receipt of such notification such governing body shall declare the other candidate elected to such office and such candidate shall receive a certificate of election and no second election need be held for that particular office, nor shall the name of the party so declining to run be printed on the ballot of any second election held under the provisions of this section. In the event there should be a tie vote cast at any such run-off election, then, in such event, such tie shall be decided by the council or other city governing body."

It will be observed that the foregoing provisions required a designation by number of the places on the council to be filled. This mandate for designation of places was repealed by Act No. 464, supra. Likewise the provisions for a second election, should no candidate get a majority of the legal votes cast, was also repealed.

It is further my opinion that the candidate for Mayor of the City of Prichard who, in the general election to be held on the third Monday in September 1948, shall receive the largest number of votes (a plurality) cast in said election, shall be declared elected to such office.

It is also my opinion that the five candidates for membership on the city council of the City of Prichard who, at said general election on the third Monday in September 1948, shall receive the largest number of legal votes (a plurality) cast at said election, shall be declared elected to membership on the city council.

My opinion that a plurality of votes is sufficient to elect a candidate for Mayor of the City of Prichard, and also the five candidates for membership on the city council of said City of Prichard, is based upon the re-enactment by the legislature of said Section 1883, Code of Alabama 1923, the said re-enactment being Section 16, Act No. 465, supra, without including therein the amendatory provisions of Act No. 644, supra, and further, said Section 16 of said Act No. 465, supra, provides that: "The persons who shall have received the largest number of legal votes for the respective offices to be filled at such election, shall be declared elected to such offices * * * * ." (Emphasis supplied.)

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 23, 1948.

Hon. V. O. Deloney,
County Agent,
Russell County,
Phenix City, Alabama.

Agricultural Cooperatives—Taxation—Exemptions.

Title 2, Section 129, Code of Alabama 1940.

1. Members of agricultural cooperatives purchasing articles of goods or merchandise from such cooperatives are not exempted from the payment of the sales tax, or use tax, due thereon.

2. Agricultural cooperatives engaging in the business of selling articles of goods or merchandise to the members of such cooperatives stand in the same relative position of any other retailer of goods, and must keep the records required by law pertaining to the collection of sales tax due on such goods or merchandise.

3. Agricultural cooperatives organized under the provisions of Title 2, Sections 115-133, Code of Alabama 1940, either with or without capital stock, must pay the annual permit fee of ten dollars levied by Title 51, Section 346, Code of Alabama

1940, as prescribed by Title 2, Section 129, Code of Alabama 1940.

4. Agricultural cooperatives organized under the provisions of Title 2, Sections 115-133, Code of Alabama 1940, with no paid capital stock, are not liable for the payment of the franchise tax levied upon domestic corporations by Title 51, Section 347, Code of Alabama 1940.

5. Opinion of the Attorney General reported in Quarterly Report of Attorney General, Vol. 39, page 44, overruled and withdrawn.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 8, 1948, is as follows:

"Several of the farmers in Russell County are desirous of forming a cooperative under the provisions of Alabama laws for the purchase of grain, feed and fertilizer and the like, for the benefit of the cooperative. As County Agent of Russell County, Alabama, I would like to know whether or not they will be required to pay a sales tax on all of the commodities purchased for them for the benefit of the members and if no sales tax is due, will they be required to pay the use tax, and will the Cooperative have to keep books for this purpose?

"We would also like to know whether or not there are any corporate tax if they do not have capital stock issued with par value? Your advice about this matter will be appreciated at your earliest convenience."

The only tax exemption statute I find applicable to agricultural cooperatives is that set out in Title 2, Section 129, Code of Alabama 1940, and pertains to mutual farming or trucking associations organized pursuant to Sections 115-133 of Title 2, *supra*. Such statute provides as follows:

"§ 129. Permit fee.—Any corporation or association organized hereunder shall pay to the state the annual permit fee of ten dollars now required by law, and shall pay all ad valorem taxes on its real and personal property, except that all cotton and all other agricultural products which have been raised or produced in the State of Alabama, title to which may be held by such corporation or association in its own right or for the use and benefit of its members, and all goods and articles purchased or acquired by such corporation, whether in or out of the state, for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this state,

shall, so long as held by such corporation or association, be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this state."

In my opinion, such exemption is directed solely at securing benefits to the cooperative corporation or association as such and provides no exemption from taxation for the individual members thereof. As pointed out by the Supreme Court of Alabama in the case of *Navco Hardware Company v. Bass*, 214 Ala. 553, 108 So. 452, the doctrine is well established, and obtains both at law and in equity, that a corporation is a distinct entity, to be considered separate and apart from the individuals who compose it.

As I understand your request, you inquire as to whether the individual members of an agricultural cooperative are liable for the payment of the sales tax, or use tax, upon articles of goods or merchandise purchased by them from or through the cooperative. In my opinion, the members are subject to and liable for such tax.

The Supreme Court of Alabama has on more than one occasion declared the sales tax as levied within the State to be, in truth, a consumers' tax. In the case of *King and Boozer v. State*, 241 Ala. 557, 3 So. 2d 572, the Court, after setting forth the manner in which such tax is levied, stated:

"* * * The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumers' tax."

Numerous citations of authority, both from this State and other states of the nation, are cited in support of this statement.

Again, in the case of *State v. Woods*, 242 Ala. 184, 5 So. 2d 732, the Supreme Court held as follows:

"* * * (1) In the enforcement of the sale tax this court declared that the burden of such tax is on the consumer, and that such sales are the basis for computing the tax. These holdings are illustrated by the recent decisions of *Long v. Roberts & Son*, 234 Ala. 570, 176 So. 213, and *State Tax Commission v. Hopkins*, 234 Ala. 556, 176 So. 210. See, also, *Graybar Electric Co. v. Curry*, 238 Ala. 116, 189 So. 186; *Id.*, 308 U. S. 513, 60 S. Ct. 139, 84 L. Ed. 437; *Id.*, 308 U. S. 638, 60 S. Ct. 259, 84 L. Ed. 530. * * *"

In view of the above decisions of the Supreme Court, it seems unquestioned that the sales tax is a consumers' tax, levied upon the ultimate consumer of the goods which are the subject of the tax, said tax to be collected by the retailer of such goods.

In my judgment, the same is true of the use tax, levied in conjunction with the sales tax. As above noted, the exemption provided for within Section 129, *supra*, accrues to the benefit of the cooperative corporation or association as such, and not to the individual members thereof. It is, therefore, my opinion that said cooperative, when engaging in the business of retailing goods or articles to its members, stands in the same relative position as any other retailer of goods or merchandise, and should collect from such members the sales tax levied by law. The same would be true of any use tax which might be due. *McCarroll v. Ozark Rural Electric Cooperative Corp.*, 201 Ark. 329, 146 S. W. 2d 693.

I should here point out, since specifically mentioned by you in your request, that it is provided by Title 51, Section 755, Code of Alabama 1940, as amended by Act No. 471, General Acts 1943, page 435, and subsequently amended by Act No. 303, General Acts 1947, page 155, that the gross proceeds of the sale, or sales, of fertilizer are exempted from the provisions of the sales tax statutes. Such commodity is likewise exempted from the provisions of law levying the use tax, by virtue of Title 51, Section 789, Code of Alabama 1940, as amended by Act No. 475, General Acts 1943, page 439, and subsequently amended by Act No. 304, General Acts 1947, page 158.

With regard to your inquiry concerning the keeping of records by the cooperative, I refer you to Title 51, Section 759, Code of Alabama 1940, which statute provides that it shall be the duty of every person engaging in any business wherein sales tax is collectible to keep and preserve suitable records of the gross sales, gross proceeds of sale, and gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of the sales tax law. Having held that the cooperative must collect from its purchasers the sales tax levied by law, I am of the opinion that the records required above as to the collection of such tax must be maintained by the cooperative.

I shall now consider your last inquiry concerning liability of the cooperative for corporate tax. From the information furnished me in your request concerning the prospective cooperative to be formed, I must assume that it is your intention that such cooperative be organized as a Mutual Farming and Trucking Association under and in accordance with the provisions of Title 2, Sections 115-133, Code of Alabama 1940. This being true, such cooperative is subject to the provisions of Title 2, Section 129, *supra*, cited and quoted herein. It is my interpretation of this statute that the provisions thereof require that all cooperatives subject thereto, whether organized with or without capital stock, pay to the State the annual permit fee of ten dollars required by Title 51, Section 346, Code of Alabama 1940.

This latter statute requires that all domestic corporations organized under and by authority of the laws of the State of Alabama pay to the State the permit fee provided for therein. The amount of such permit

fee is fixed upon the amount of paid capital stock of such corporation, it being provided that:

"* * * * For all such permits said corporation shall, when authorized to do business as a corporation, and annually thereafter, on or before the first day of February of every year, pay to the department of revenue a fee of ten dollars per annum, or for a part of a year, if the paid capital stock of such corporation is less than twenty-five thousand dollars; * * * *"

It is my opinion, that a corporation organized without capital stock falls within the purview of the above-quoted provision and is subject to payment of the minimum fee of ten dollars, and it is my further opinion that this is the specific provision referred to by Title 2, Section 129, supra, requiring that those cooperatives organized as Mutual Farming and Trucking Associations, be required to pay to the State the annual permit fee of ten dollars now required by law. The holding of a former opinion of this office found reported in Quarterly Report of Attorney General, Volume 39, page 44, although dealing with Incorporated Marketing Associations, is inconsistent and in conflict with the opinion expressed herein and, accordingly, such opinion is expressly overruled and withdrawn.

Relative to the liability of such a cooperative for payment of the franchise tax levied by Title 51, Section 347, Code of Alabama 1940, it is my opinion that, if such cooperative be organized without capital stock, no franchise tax would be due.

Section 229, Constitution of Alabama 1901, provides, in pertinent part, as follows:

"* * * The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this state, which shall be in proportion to the amount of capital stock; but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. * * *"

Pursuant to such direction, the Legislature has enacted Title 51, Section 347, supra, which provides as follows:

"Every corporation organized under the laws of this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of two dollars on each one thousand dollars of its capital stock."

The Supreme Court of the State has held the constitutional requirements to levy a franchise tax on corporations to be mandatory and that the mandate applies to all domestic corporations save those expressly excepted from the tax, *State ex rel. Smith, Atty. Gen., v. Elba Bank and Trust Co.*, 18 Ala. App. 253, 91 So. 917, in which the Supreme Court gave

answer to questions certified to them by the Court of Appeals concerning the above constitutional provision.

Neither, in my opinion, does an agricultural cooperative fall within the exceptions granted by the constitutional and statutory provisions above set out as being either a strictly benevolent, educational or religious corporation. Biennial Report of Attorney General, 1922-24, page 36. However, inasmuch as the levy of such franchise tax is based specifically upon the amount of capital stock of those corporations subject thereto, it is my opinion that if the corporation to which you refer be organized without capital stock, no such franchise tax would be due inasmuch as the provisions of Title 2, Section 347, supra, could not be made applicable to such corporation in fixing the amount of tax. Quarterly Report of Attorney General, Volume 6, page 153; Quarterly Report of Attorney General, Volume 7, page 38.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 23, 1948.

Honorable C. J. Coley,
Judge of Probate,
Tallapoosa County,
Dadeville, Alabama.

Counties

Members of county governing bodies while attending meetings of National Association of County Officials or of Association of County Commissioners of Alabama, are entitled to per diem as provided by Section 6771, Code of Alabama, 1923, as amended.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of May 31, 1948, is as follows:

"The National Association of County Officials for the fiscal year 1946-47 held its annual convention in Salt Lake City, Utah. The Association of County Officials for the State of Alabama held its convention in Mobile, Alabama, for the same year.

"The Court of County Commissioners of Tallapoosa County, Alabama, prior to the date of the conventions authorized by a resolution on its Minutes the payment of all legal expenses incurred by its members while attending the conventions.

"One member of the Court who attended the convention in Salt Lake City, and two members that attended the convention in Mobile, in addition to their actual travel, hotel lodging, and meals filed a claim with the County for their per diem as allowed the Court members by the General Acts of Alabama 1939, page 1049, Code reference, Title 12, Section 28, Code 1940. This claim was allowed by the County and paid from the Road and Bridge Fund Account.

"I am familiar with the opinion by Attorney General William N. McQueen found in Quarterly Report Volume 41, page 46, dated December 20, 1945, which deals with expenses for the officials while attending the conventions, but I request an official opinion by you as follows:

"(1) Can the County Governing Body legally pay its members the per diem provided for by the foregoing mentioned statutes out of the Road and Bridge Fund account of the County for the days spent at the conventions.

"(2) If your answer to question One is in the negative, would it be a legal expenditure of County Funds to pay the salary of the members of the County Governing Body for the days spent in attending the conventions of County Officials where said officials are on a monthly salary basis by local laws and paid from the General Fund Account of the County."

My answer to your first inquiry is in the affirmative.

It is to be noted that the opinion referred to in your request, appearing in Quarterly Report of Attorney General, Vol. 41, page 46, and from the opinions therein cited, the basis of holding that members of county governing bodies are entitled to their actual travelling expenses while attending conventions, is based on Title 23, Section 43, Code of Alabama 1940. This section provides that county governing bodies have the power and authority to do all things needful and necessary in and about the construction and maintenance of public roads. The former opinions of this office hold that members of county governing bodies obtain valuable information in regard to the construction and maintenance of public roads by attending conventions held by their associations. Such bodies have unlimited jurisdiction and power insofar as public roads and bridges are concerned, and, therefore, have the power and authority by proper resolution to pay all necessary expenses in obtaining this information, namely, their travelling expenses to and from the convention. Therefore, since this office has held that a county may legally pay the expenses of the members of its governing body in attending these conventions, it seems to me that it necessarily follows that it may also pay the per diem of such members as provided in Section 6771, Code of Alabama 1923, as amended by Act No. 662, General Acts 1939, page 1049, (Title 12, Section 28, Cumulative Pocket Part, Code of Alabama 1940), for certain it is, this per diem allowed to them is for meeting

and attending to matters in connection with the maintenance and construction of public roads.

You are, therefore, advised that, in my opinion, the claim filed by the members of your court was a proper and legal claim, and was properly paid out of the road and bridge fund account.

Since I have answered your first question in the affirmative, it obviates the necessity of answering your second question.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 27, 1948.

Hon. W. L. Parrish,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Words and Phrases—Taxation.

The term "mill" as used in Title 51, Section 499, Code of Alabama 1940, as amended by Act No. 136, General Acts 1947, page 44, connotes the use of machinery in the process of manufacturing.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of March 18, 1948, is as follows:

"Your opinion is requested on the following:

"Mr. M. L. White, citizen and taxpayer of Chilton County, manufactures well tiling out of cement, gravel and sand, with the use of two wooden forms or molds. He mixes the cement, gravel and sand with shovels and hoes and has no mill or machinery in the manufacture of same and the mixture is placed in the mold and allowed to stand some 24 hours to bond or set.

"Would he be liable under Section 499 of Title 51, 1940 Code of Alabama, as amended by Act No. 136 (H. 233, Callahan, approved July 8, 1947) for a license as provided therein?"

Title 51, Section 499, Code of Alabama 1940, as amended by Act No. 136, General Acts 1947, page 44, provides, among other things, for a privilege license tax on persons operating factories or "mills manu-

facturing any finished or semi-finished products of * * * * cement * * * *."

It was the clear intent of the legislature to impose the license on every person operating a mill or factory. Therefore, we turn to the accepted definition of the word "mill" to determine the coverage of the act.

Webster's New International Dictionary, Second Edition, Unabridged, defines "mill" as follows:

"Any of various machines which produce a manufactured product by the continuous repetition of some simple action; as, a sawmill; stamp mill, etc.

"A building or collection of buildings with machinery by which the process of manufacturing are carried on; as, a cotton mill; a powder mill; a rolling mill." (Emphasis supplied.)

In Black's Law Dictionary, Third Edition, the following definition appears:

"A complicated engine or machine for grinding and reducing to fine particles grain, fruit, or other substance, or for performing other operations by means of wheels and a circular motion; also the building containing such machinery. State v. Livermore, 44 N. H. 387; Lamborn v. Bell, 18 Colo. 346, 32 P. 989, 20 L. R. A. 241; Home Mut. Ins. Co. v. Roe, 71 Wis. 33, 36 N. W. 594; Halpin v. Insurance Co., 120 N. Y. 73, 23 N. E. 989; Southwest Missouri Light Co. v. Schuerich, 174 Mo. 235, 73 S. W. 496; Casey v. Barber Asphalt Paving Co. (C.C.A.) 202 F. 1, 5."

The following definition of "mill" appears in 27 Words and Phrases, page 186:

"The term 'mill,' in modern usage, includes various machines or combinations of machinery, as cotton mills, fulling mills, powder mills, etc., to some of which the term 'manufactory' or 'factory' is also applied. Lamborn v. Bell, 32 P. 989, 991, 18 Colo. 346, 20 L. R. A. 241."

From the foregoing, it is clear that the use of the term "mill" connotes the use of machinery in the process of manufacturing and would not cover the mixing by hand of cement which is allowed to set in molds.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

July 29, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner of Accounts,
Department of Finance,
Division of Examiners of Public Accounts,
CAPITOL.

Municipal Corporation—Employees—Retirement—Section 94,
Constitution of Alabama 1901.

In the absence of any legislative act applicable to the city in question authorizing the establishment of a pension or retirement system for the employees of such municipality, and the governing body of such city having failed to elect to have the employees of such city become eligible to participate in the retirement system established by Act No. 515, General Acts 1945, page 734, as amended, any expenditure of the funds of such municipality for the purported purpose of retirement or pension of any employee thereof is unauthorized and invalid.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 5, 1947, is as follows:

"Mr. Lewis of the City Council of Bessemer has sent me the enclosed resolutions which are copied from the Minutes of the Council, and asked the following questions:

"1. Are the expenditures of City funds legal under these resolutions?

"2. Is there any authority of law for the retirement of city employees when there is no local law authorizing the City to set up a retirement plan for employees?

"3. Are the reasons of retirement, as contained therein, legal reasons?

"If your answer to the first and second questions are in the affirmative, I would appreciate it if you would give me your opinion on the questions in regard to these several resolutions separately, as they contain different reasons of retirement."

The resolutions to which you refer in your request for opinion were adopted by the City Council of Bessemer, and consist of one resolution setting forth a contract between the Chief of Police of said municipality and the city, whereby, in consideration of future payments of one hundred dollars monthly, said Chief of Police agrees to tender his resigna-

tion from office. The City Council, by resolution, resolved that said agreement be entered into and that such payments be made. The two other resolutions adopted by such City Council, and attached to your request for opinion, purport to retire two other employees of the city on half pay, for the reasons set out in said resolutions. You inquire as to the validity of such expenditure of city funds, in the absence of any statutory authority creating a retirement system whereby compensation may be paid to the employees of the city concerned.

In my opinion, such expenditure of the public funds of the city is unlawful and invalid. As above noted, that resolution adopted by the City Council, affecting the Chief of Police, sets forth a contract, or agreement, entered into between the city and such employee, whereby, in consideration of monthly payments of one hundred dollars, said employee agrees to tender his resignation from office.

It is my opinion that such an understanding, or agreement, cannot attach to any resignation tendered, and a payment in the manner described would be an unlawful expenditure of public funds. If, and when, the Chief of Police's resignation is concluded, his service ceases as of the effective date of such resignation. This office, in an opinion reported in Quarterly Report of Attorney General, Volume 27, page 72, held in effect that a public employee may not be paid beyond the date of his ~~lawful termination~~ of service. To do so would, as stated, be in effect a donation of public funds to an individual. Constitution of Alabama 1901, Section 94, stands as an insuperable barrier to the Legislature delegating such authority to any municipality of the State. This constitutional section reads as follows:

"Sec. 94. The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

The other two resolutions purporting to retire employees of the city with pay are, for the above reasons, likewise invalid insofar as they authorize the expenditure of funds of the city.

A municipality may, under the authority of legislative enactment applicable to the particular municipality, create a retirement system for the employees of such municipality, or any municipality of the State may, under the authority of Act No. 515, General Acts 1945, page 734, as amended by Act No. 606, General Acts 1947, page 445, by resolution legally adopted elect to have the employees of such municipality become eligible to participate in the retirement system established by Act No. 515, supra, as amended. I find no legislative act creating or establishing a retirement system for the City of Bessemer, and I am informed by the Secretary-Treasurer of the Employees' Retirement System that such city has taken no steps to have the employees thereof become

eligible for participation in the retirement system established by Act No. 515, supra, as amended. It is, therefore, my opinion that any expenditure of the funds of such municipality for the purported purpose of the retirement or pension of any employee thereof is unauthorized and invalid.

In answering your first inquiry, I have given answer to your second and in view of the answer herein given, your third inquiry becomes inapplicable and answer thereto is unnecessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 29, 1948.

Honorable Frank A. Boswell,
Director,
Department of Corrections & Institutions,
CAPITOL.

Department of Corrections and Institutions—Sales—Brokerage Fee.

Under the provisions of Title 45, Sections 3 and 7, Code of Alabama 1940, the Department of Corrections and Institutions may legally pay a reasonable brokerage fee in effectuating an authorized sale of its commodities, said fee being merely incidental to the sale.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of July 23, 1948, is as follows:

"It is requested that you render an opinion as to whether or not this department has the authority to pay brokerage for the sale of farm products.

"Section 3, Title 45 of the Code of Alabama 1940, regarding the functions and duties of the department reads in part as follows:

"To sell, distribute, process, or otherwise dispose of all farm products, livestock or poultry raised, or articles, goods, or wares made or manufactured by use of labor or machinery under the control or supervision of this department, or any personal property not needed.'

"Section 7 of Title 45 of the Code of Alabama 1940, reads in part as follows:

"The director shall have all power and authority necessary or convenient to carry out the functions and duties of the department."

"This department has sold 5500 bushels of corn through a brokerage company on which we agreed to allow them two cents per bushel brokerage. In order to dispose of this corn it was necessary and convenient that we pay this brokerage company a commission of two cents per bushel."

I am of the opinion that your inquiry should be answered in the affirmative.

The pertinent parts of the Code sections quoted in your letter of inquiry, in my judgment, furnish ample authority for the payment of the brokerage fee under consideration.

The common commercial practice of paying a reasonable brokerage fee in the sale of commodities is one of long standing to which the State is in nowise exempt. The payment of such a fee is merely incidental to the consummation of the actual sale, which is authorized by statute. If, in the judgment of the Director of the Department of Corrections and Institutions, the payment of such a fee is necessary for the consideration of a reasonable brokerage fee, then such a fee may be paid. I am of the opinion that the payment of such a fee is not prohibited by the Code sections quoted in your letter of inquiry. I am of the opinion that the payment of such a fee is not prohibited by the Code sections quoted in your letter of inquiry.

Report

I am herewith returning the file in this matter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 2, 1948.

Hon. Roberts H. Brown,
City Attorney for the City of Auburn,
Lee County,
Auburn, Alabama.

Municipalities—Officers and Offices.

1. Offices of city clerk and city recorder of Auburn, Alabama, are not vacated by change from aldermanic to commission form of government.

2. Position of city manager, the city planning commission, and the park and recreation board of Auburn, Alabama, are vacated by change from aldermanic to commission form of government.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of July 26, 1948, is as follows:

"The undersigned City Attorney for the City of Auburn, Lee County, Alabama, was directed by the Board of Commissioners of the City of Auburn at its regular meeting held on the 20th day of July, 1948, to propound to you for ruling the following inquiries:

"When a Municipal Corporation effects a change over from the Mayor-City Council type of government to a commission form of government under the provisions of Title 37, Chapter 4, Article 1, Code of Alabama, (1940), does Section 45 of Title 37, Code of Alabama, (1940) have the effect of vacating the appointments of the following officers and boards of the City Government, the said appointments having been made by the Mayor and City Council prior to the change over:

1. City Clerk
4. City Council
5. Park and Recreation Board.

"A prompt reply will be appreciated."

Both the city clerk and the city recorder, serving under an aldermanic form of government, are salaried officers with fixed terms. They serve pursuant to Title 37, Section 406, Code of Alabama 1940, which reads as follows:

"§ 406. Certain officers in cities of less than six thousand inhabitants; election; terms of office, etc.—In cities having a population of less than six thousand and in towns, the council shall elect a clerk, and may elect a recorder, and fix their salary and term of office, and may determine by ordinance the other officers of the city or town, their salary, the manner of their election and the term of office, and shall fill all vacancies in the council by a majority vote of the council. There shall be no recorder in towns."

The foregoing officers, in my judgment, fall within the influence of a provision in Title 37, Section 50, Code of Alabama 1940, reading, in part, as follows:

"§ 50. Employees and officers; selection and duties of; removal of.—* * *. Provided, however, that all salaried officials, except

members of the boards and commissioners above mentioned, and the recorder if any who are holding office at the time of the adoption of such form of government under an election, appointment, or other selections for a definite term, shall be permitted to serve out such term in the position and with the duties and compensation, and subject to the conditions, restrictions and regulations, which would have existed had there been no change in the government of such city.
* * * *"

The city manager, employed by the council, serves pursuant to Title 37, Section 419, Code of Alabama 1940, which authorizes the payment of a maximum salary, and is subject to a provision in said section as follows:

"§ 419. * * * *. The term of office of the city manager shall be co-extensive with the term of office of the governing body, provided that he may be discharged upon sixty days written notice following the vote of as many as two-thirds of the entire number of members of the governing body."

This provision does not, in my judgment, authorize an appointment for a "definite term," but only for a term co-extensive with the term of office of the governing body that is revocable by a vote of two-thirds of the membership of the governing body.

The city planning commission was created pursuant to Title 37, Chapter 16, Article 3, Code of Alabama 1940, and the members thereof serve without compensation. See Title 37, Section 788, Code of Alabama 1940.

The park and recreation board exists by virtue of Act No. 350, General Acts 1945, page 565, and the members thereof serve without compensation.

The city manager and members of both the city planning commission and the park and recreation board are subject to the provisions of Title 37, Section 45, Code of Alabama 1940, reading as follows:

"§ 45. Board of commissioners; powers of.—The commissioners of such city, to be known as the board of commissioners of such city, shall have, possess and exercise all the powers and authority, legislative, executive, and judicial, possessed and exercised by the mayor and board of aldermen and board of police commissioners, and any and all other boards (except board of education), commissions and officers of said city of any and every sort whatsoever; and all such boards, commissions and officers (except those provided for by this article) shall then and thereby be abolished and the terms of office of any and all such officers or officials shall then and thereby cease, except boards of education. Such city shall continue its existence as a body corporate under the name of 'City of _____' (inserting the name of such city). It shall continue to be subject

to all the duties and obligations then pertaining to or incumbent upon it as a municipal corporation, and shall continue to enjoy all the rights, immunities, powers, and franchises then enjoyed by it, as well as those that may thereafter be granted to it."

It is to be noted the provision quoted herein from Title 37, Section 50, Code of Alabama 1940, preserving the definite terms of salaried officials, was placed in the Code by the Code Committee, and became effective on May 31, 1941. This provision was the last expression of the Legislature and prevails as against any contradiction in Section 45 of Title 37, *supra*.

I, therefore, conclude that the offices of city clerk and city recorder were not vacated by the recent change of the form of government in Auburn.

I further conclude that the position of city manager, the city planning commission, and the park and recreation board were vacated by such change in the form of government, and they no longer obtain.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 3, 1948.

Honorable Herman Thompson,
City Commissioner,
City of Bessemer,
Jefferson County,
Bessemer, Alabama.

Municipality—Municipal Water Works—Fixation of Rates.

1. City of Bessemer may fix and determine rates for water service which it furnishes from water plant that it owns and operates.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of July 27, 1948, is as follows:

"I am one of the City Commissioners of the City of Bessemer, Alabama. I am enclosing a copy of Resolution as passed by the City Commission setting water rates for the city of Bessemer, Alabama, and as such Commissioner I would very much appreciate it if you would give me your opinion as to whether or not this Resolution is legal and valid.

"Thanking you very much for your opinion on this matter."

It is my opinion that the City Commission of the City of Bessemer has legal authority to fix and determine the rates for water service furnished from the water plant that it owns and operates. I refer to a provision in Title 48, Section 18, Code of Alabama 1940, which I quote as follows:

"§ 18. Supervision of utilities.—* * * * Provided, however, that nothing contained in this title shall be deemed to confer upon the commission, power and jurisdiction to regulate and supervise any utility owned and operated by any municipal corporation in the state."

The resolution, copy of which you endorsed, if validly passed or adopted, is within the purview of the afore-quoted provision.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 4, 1948.

Hon. G. C. Brittain,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Filing Tax—Churches.

Under Title 51, Section 618, Code of Alabama 1940, a deed from the Trustees of the First Baptist Church of Anniston (unincorporated) to the First Baptist Church of Anniston, Incorporated, is subject to deed filing tax upon recordation of said deed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of July 23, 1948, is as follows:

"Please furnish this office your official opinion on the following question:

"The First Baptist Church of Anniston purchased some property during the year 1947, the deed to the property being made to the Trustees of the First Baptist Church of Anniston. This deed was recorded and the regular deed tax paid.

"Recently the First Baptist Church of Anniston has incorporated and is now the First Baptist Church of Anniston, Incorporated. This

Church now desires to change the title of its property from the Trustees of the Church to the First Baptist Church of Anniston, Incorporated, and has executed deed accordingly.

"On filing this second deed for recording should a deed tax be collected, keeping in mind that a deed tax was collected at the time the Church filed the first deed in 1947 and that the second deed now offered for recording is a transfer of the same property from the Trustees of the Church to the Church as a Corporation.

"Your kindness in advising your opinion will be very helpful and much appreciated."

In answer to your inquiry, it is my opinion that the deed in question requires a deed filing tax upon recordation.

The recording of deeds conveying property to religious, educational, or charitable institutions is subject to the deed filing tax provided for in Title 51, Section 618, Code of Alabama 1940.—Biennial Report of Attorney General, 1926-1928, page 680; Biennial Report of Attorney General, 1934-1936, page 480.

Where the title to property was in the trustees, a deed from the trustees to the beneficiary under the trust is subject to the deed tax.—Quarterly Report of Attorney General, Volume 47, page 169; Quarterly Report of Attorney General, Volume 1, page 117. Even considering the First Baptist Church of Anniston (unincorporated) and the First Baptist Church of Anniston, Incorporated, as the same beneficiary under the trust, the deed from the trustees would be subject to the deed filing tax. Moreover, the unincorporated association and the incorporated association are separate legal entities, and a deed from the trustees of the former association to the latter association would be subject to the tax in question.—Cf. *Hawkins v. Pure Oil Co.*, 232 Ala. 660, 169 So. 307.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 4, 1948.

Hon. Dayton Robinson,
Superintendent of Education of
Clarke County,
Grove Hill, Alabama.

Teachers—Schools—County Boards of Education—County Superintendents of Education—Salaries—Contracts.

1. The Superintendent of Education does not have power and authority to transfer a teacher on continuing service status from one position, school, or grade to another position, school,

or grade without the concurring action of the employing Board of Education.

2. The employing Board of Education does not have power and authority to transfer a teacher on continuing service status from one position, school, or grade to another position, school, or grade without the Superintendent's concurring recommendation.

3. The employing Board of Education does not have power and authority to vest in the Superintendent blanket authority to transfer teachers on continuing service status; such teachers must be transferred individually and by name.

4. The unauthorized transfer, by the Superintendent, of a teacher on continuing service status is not subject to ratification by the employing Board of Education.

5. The transfer of a teacher on continuing service status must be attested by written memorial recorded in the employing Board of Education's minutes or other records.

6. To effect the transfer of a teacher on continuing service status, the law requires that such teacher be recommended for transfer by the Superintendent; that the employing Board of Education consider the matter while sitting as a deliberative body; that the Board order the transfer, its action being recorded in its minutes or other records; that the transferred teacher not be rejected, in the manner provided by law, by the trustees of the school to which transferred.

7. Where a teacher on continuing service status has been transferred and rejected by the trustees of the school to which transferred, no legal transfer has been effected and such teacher remains in her former position, school, or grade.

8. A teacher on continuing service status who has not been transferred in the manner provided by law maintains her former position, school, or grade. If denied, her rights can be enforced by mandamus proceedings. Where a new teacher holding a year's contract has been hired to replace her, upon the mistaken assumption that a lawful transfer has been effected, unless such new teacher can be placed elsewhere she is without active teaching status and the employing Board of Education is liable for her salary for the ensuing school year.

9. Where a teacher on continuing service status is transferred she must be transferred to a like position, school, or grade, such teacher's salary being governed by the provisions of Title 52, Section 354, Code of Alabama 1940.

10. Since the Superintendent's function is to nominate and the Board's function is to appoint, the Superintendent of Education does not have power and authority to enter into an original contract of employment with a teacher, without approval of the employing Board of Education; such a contract entered into by the Superintendent without such approval is not a legal and binding contract.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of July 5, 1948, is as follows:

"Enclosed is a copy of the minutes of the Clarke County Board of Education as of June 25, 1948, which entry on the minutes is all that I have found dealing with transfer of any teachers. Assuming authority, as of the above minutes, Mr. D. C. Mathews, my predecessor, sent notices to four teachers in our Grove Hill County High School, a copy of one of these notices being attached hereto, that they were transferred to our High School at Coffeeville, Alabama, and advised them to get in touch with the Principal, Mr. Edison Gilmore, who would inform them of their duties.

"One of these teachers has had an attorney appear before the County Board in a special meeting on July 1, 1948, and inform the Board that she considered that the transfer had no legal bearing on her present status and that she was still a teacher at the Clarke County High School, Grove Hill, Alabama, in the same status as before she received the notice.

"I would like to ask your opinion on the following points:

"(1) Does the Superintendent of Education have the power and authority to transfer a teacher on continuing service status without authority from the employing Board of Education?

"(2) Does the employing Board of Education have the power and authority to transfer a teacher on continuing service status without the Superintendent's concurring recommendation?

"(3) Does the employing Board of Education have the power and authority to give to the Superintendent blanket authority to make transfers of teachers on continuing service status whom the Superintendent thereafter selects and transfers, or must such teachers be transferred individually and by name?

"(4) Assuming that a teacher on continuing service status has been transferred by the Superintendent, without the concurrence of the employing Board of Education, can a majority of the mem-

bers of the Board of Education thereafter ratify and confirm the Superintendent's unauthorized action?

"(5) Assuming no written memorial of the employing Board of Education's action in transferring a teacher on continuing service status, is such transfer effective where that was the intention of a majority of the members of the Board of Education?

"(6) Please outline for me, step by step, the exact legal procedure which must be taken to effect the transfer of a teacher on continuing service status from one position, school, or grade to another position, school, or grade.

"(7) What is the status of a teacher on continuing service status who has been transferred, either (a) by the Superintendent without the approval of the employing Board of Education or (b) by the Board of Education upon the recommendation of the Superintendent, and thereafter has been rejected in the manner provided by law by the trustees of the school to which the teacher was transferred?

"(8) Assuming that such teacher is returned to the first school, what is the status of a newly employed teacher who has not acquired continuing service status, but nevertheless holds a year's contract? Can the teacher with continuing service status insist upon the right to teach or are her rights protected merely by payment to her of her monthly salary?

"(9) Where a teacher on continuing service status is transferred by the employing Board of Education, upon the recommendation of the Superintendent, must the teacher be transferred to a like position, school, or grade, to that held by such teacher prior to the transfer? Specifically, could the Principal of a High School, on continuing service status, be transferred to another High School in the capacity of a teacher, or would such Principal have to be transferred to another High School in the capacity of Principal? In the event of the transfer of such a teacher, is such teacher entitled, under the law, to the same salary for the succeeding year as the teacher who succeeds him or her in his or her old position? If not, to what salary would the transferred teacher be entitled?

"(10) Does the Superintendent have the power and authority to enter into an original contract of employment with a teacher, not previously employed in that school system, without the approval of the employing Board of Education? If such a contract is entered into by the Superintendent without such approval, is it a legal and binding contract?"

In construing the provisions of the Teacher Tenure Act, codified as Title 52, Sections 351-361, Code of Alabama 1940, and amended by Act No. 410, General Acts 1945, page 646, and Act No. 411, General Acts

1945, page 646, we must look to the evils which that Act was intended to cure. Mr. Chief Justice Gardner, of our Supreme Court, has said:

"The very laudable purpose of this Act was to insure to the teachers some measure of security in their important work and to free them, at least to a measurable extent from the 'vicissitudes of politics' or the likes or dislikes of those charged with the administration of school affairs."

"Such being the manifest purpose of the Act it should be liberally construed in favor of the teachers, who constitute the class designated to be its primary beneficiaries" *Board of Education of Marshall County v. Baugh*, 240 Ala. 391, 199 So. 822.

The pertinent part of the County Board of Education's minutes (a copy of which minutes is attached to your request) reads as follows:

"The Superintendent explained his efforts to carry out the wishes of the various local boards of trustees in the employment of teachers for the session of 1948-49, and his nomination of the teachers who had been employed in the County High School were confirmed. The transfer of any teachers who were displaced was confirmed in order that such transferred teachers might be protected in their teacher tenure status."

I come then to consideration of your specific questions which are answered in the order asked. In reaching my answers I have accorded a liberal construction to the Act, being ever mindful in so doing of its laudable purpose as stated by our Supreme Court, *supra*.

(1) Title 52, Section 123, Code of Alabama 1940, provides:

"The county superintendent of education shall nominate in writing for appointment by the county board of education, all principals, teachers, and all other regular employees of the board. He shall assign them to their positions, transfer them as the needs of the schools require, recommend them for promotion, suspend them for cause, and recommend them for dismissal, subject to the provisions of chapter 13 of this title." (Emphasis supplied.)

Title 52, Chapter 13, Section 355, Code of Alabama 1940, provides:

"Any teacher on continuing service status, upon the recommendation of the superintendent, may be transferred for any succeeding year from one position, school, or grade to another without loss of status or violation of contract."

Without the protection of the Teacher Tenure Act, a teacher might, under the authority of Section 123, *supra*, be transferred by the Superintendent of Education "as the needs of the schools require." The Act was approved on September 21, 1939. When the Code of Alabama 1940

became effective on May 31, 1941, the limiting clause of Section 123, supra, viz., "subject to the provisions of chapter 13 of this title," became a part of the 1940 Code. Section 123, supra, was formed by lifting Section 161 of the 1927 School Code in haec verba into the 1940 Code and then adding the said clause. Therefore, Section 123, supra, must be construed in the light of, and is subject to the limitations of, the Teacher Tenure Act, specifically, Section 355, supra. This construction of the effect of the Teacher Tenure Act on Section 161, supra, by the Code Committee, is in exact accord with the construction of the effect of said Act on said section previously made by me. Quarterly Report of Attorney General, Vol. 20, page 221, and Quarterly Report of Attorney General, Vol. 22, page 259.

That section speaks of the transfer of a teacher on continuing service status "upon the recommendation of the superintendent." Unlike Section 123, supra, it does not state that the Superintendent himself shall transfer her. Although his recommendation is a prerequisite, the import of the statute is that she can be transferred only by some higher authority, to-wit, the employing Board of Education, with the concurring recommendation of the Superintendent. An accepted definition of the verb transitive "recommend" is "to offer or suggest with favoring representations." Webster's Collegiate Dictionary (5th Ed. 1942). Therefore, in my judgment, the statute necessarily implies that, in the matter of the transfer of such a teacher, the Superintendent's function is advisory merely, the power and authority to consummate the transfer being vested solely in the employing Board of Education.

Your first question, therefore, is answered in the negative.

(2) Section 355, supra, states that "upon the recommendation of the superintendent" any teacher on continuing service status may be transferred, etc. I interpret the Act to mean that upon his recommendation, she then, and only then, may be transferred by the employing Board of Education. The Superintendent's initial recommendation is the key which unlocks the matter for consideration by the Board. In my judgment neither the Superintendent nor the Board can effect the transfer of such a teacher independent of the other. Each must act in conjunction with the other and both must reach the same conclusion after due consultation and deliberation. Thus, the Legislature has wisely balanced between these two governing authorities this important matter of the transfer of a teacher on continuing service status.

Your second question, therefore, is answered in the negative.

(3) In speaking of the important matter of re-employment of a teacher on continuing service status, our Supreme Court has held that matter to be one for the consideration of the employing Board of Education and that its duty in this regard is of such character as not to be delegated to another. The teacher has the right to assume that the question of her re-employment has been considered and acted upon by the Board of Education sitting as a deliberative body.—Board of Education

of *Marshall County v. Baugh*, supra; *Brown v. Board of Education of Blount County*, 242 Ala. 154, 5 So. 2d 629. Thus, it was held that where a resolution attempting to delegate to the Superintendent power to terminate the employment of teachers was void, the County Board could not thereafter ratify the action of the Superintendent in giving notice of termination to certain teachers. *Board of Education of Marshall County v. Baugh*, supra.

In my judgment, the matter of transfer is of equal importance to that of re-employment and must be governed by the same principles. This is clear from the wording of Section 355, supra.

The award to the Superintendent of blanket authority to transfer such teachers who, in his judgment, should be transferred would, therefore, constitute an unauthorized and unlawful delegation of the Board's duty and authority and would be a nullity. We have seen, supra, that only the Board itself, after having received the Superintendent's concurring recommendation, can effect a transfer. Since a transfer affects each teacher individually, in my judgment each teacher on continuing service status sought to be transferred must be considered individually and by name and must be transferred as an individual, rather than as a unit in a group.

The answer to your third question, therefore, is that the Act does not allow the awarding of blanket authority; it contemplates only individual transfers of such teachers designated by name.

(4) We have seen above that the Board cannot delegate its responsibility with respect to such transfers. It is fundamental that an act done in behalf of another without authority is by positive law or public policy declared to be illegal and void. Such an act is not subject to ratification. The Teacher Tenure Act contemplates, first, a recommendation by the Superintendent, and then consideration by the Board. Nothing in the Act justifies any circuitous action in this regard, such as first a notice by the Superintendent subsequently ratified by the Board. Any other interpretation would tend to constitute the Board a mere stamping machine, rather than a deliberative body.—*Board of Education of Marshall County v. Baugh*, supra; C. J. S., Agency, Section 37, page 1075.

Your fourth question, therefore, is answered in the negative.

(5) The County Board of Education speaks through its records, or written memorials.—*Board of Education of Escambia County v. Watts*, 19 Ala. App. 7, 95 So. 498; *Ex parte Watts*, 209 Ala. 115, 95 So. 502. Our Supreme Court has held that the matter of re-employment of a teacher is so important a matter that there should be some written memorial of the Board's direction to give notice to a teacher that she would not be re-employed.—*Board of Education of Marshall County v. Baugh*, supra. The matter of transfer being of equal importance, in my judgment the Board's action in effecting the transfer of a teacher on continuing service status must be attested by some written memorial, in its minutes or other records.

Your fifth question, therefore, is answered in the negative.

(6) In my judgment, the Act, as interpreted by our Supreme Court, requires the following procedure to effect the legal transfer of a teacher on continuing service status from one position, school, or grade to another position, school, or grade: (a) the teacher must be recommended for transfer by the Superintendent; (b) the employing Board of Education, sitting as a deliberative body must concur in the recommendation and, by written memorial recorded in its minutes or other records, order her transfer individually and by name; (c) the transferred teacher must not be rejected, in the manner provided by law, by the trustees of the school to which transferred.

(7) It was seen above that one of the requisites of a legal transfer of a teacher on continuing service status is that the transferred teacher must not be rejected, in the manner provided by law, by the trustees of the school to which transferred. Title 52, Section 140, Code of Alabama 1940, provides that the trustees of such school may, in the manner therein provided, by unanimous consent within ten days from receipt of the Superintendent's notice of assignment, refuse to accept such teacher. Therefore, should the transferred teacher be rejected as provided in Section 140, *supra*, in my judgment no legal transfer has been effected and the teacher remains in the same position, school, or grade which she held prior to the attempted transfer. The same result must follow whether such teacher be ordered transferred (a) by the Superintendent without the approval of the employing Board of Education or (b) by the employing Board of Education upon recommendation of the Superintendent.

(8) Since acceptance of the teacher on continuing service status by the trustees of the new school is an integral part of a legal transfer, should they, in the manner provided by law, refuse to accept the teacher, no transfer has taken place. Therefore there is no vacancy, and it follows that any newly-appointed teacher, hired to replace her, must be shifted elsewhere. If that be not possible and if the newly-appointed teacher holds a year's contract, in my opinion the employing Board of Education, nevertheless, must pay her monthly salary for the ensuing school year.

I am of the further opinion that the teacher on continuing service status, after offering herself as ready, able, and willing to assume her former position, school, or grade, can insist upon the right to teach, which, if denied, she can enforce by petition for mandamus. See Title 52, Section 358, Code of Alabama 1940, as amended by Act No. 410, General Acts 1945, page 646. Involved is her right to continue to teach, as well as her right to compensation as provided by her contract. *Board of School Commissioners of Mobile County, et al v. Hahn*, 246 Ala. 662, 22 So. 2d 91. Therefore, in my judgment the Teacher Tenure Act guarantees to a teacher on continuing service status the assurance that she can, if she desires, maintain her status as an active teacher. Monetary considerations aside, she has a vital stake in maintaining her professional standing and growth. It follows that mere payment of her monthly salary does not fully protect those rights.

(9) In arriving at an answer to your ninth inquiry there must be considered, in addition to Section 355, *supra*, the provisions of Title 52, Section 354, Code of Alabama 1940, which provides as follows:

"The salary or compensation of any teacher on continuing service status may be changed for any succeeding year to accord with a general salary schedule adopted by the employing board of education; provided, however, that no salary schedule shall operate to compensate teachers in less sums than the sums contained in a minimum salary schedule, which may be adopted by the state board of education of Alabama for teachers in the public schools of the state."

In construing those sections, in a previous opinion I have held that a teacher re-employed under the provisions of the Teacher Tenure Act is entitled to be paid the same salary for the succeeding school year, which the teacher received during the previous school year; unless, because of the condition of the revenues in the school system in which such teacher is employed, there is a general reduction in the salary schedule or a general shortening of the terms in the county, or vice versa; in which event such teacher's salary for the succeeding school year will be affected accordingly.—Quarterly Report of Attorney General, Volume 22, page 259.

Under a similar Teacher Tenure Act in a neighboring state, it was held that the unlawful demotion of a teacher can be equivalent to discharge and that a teacher, under the Act, cannot be removed from office indirectly when it admittedly could not be effected directly. The Act there was construed to mean that the word "office," as used in that statute, refers to the particular type of teaching position or status which the teacher has attained, though not the identical position, and that the disturbance of the teacher from that attained position or status is a removal from office under the statute.—*State Ex rel. Bass v. Vernon Parish School Board*, 194 So. 74, (La. App.).

In my judgment the same interpretation is applicable to our own Teacher Tenure Act, and I conclude that when a teacher on continuing service status is transferred, in the manner hereinabove described, from one position, school, or grade, she must be transferred to a similar, although not identical position, school, or grade. Specifically, a principal on continuing service status is entitled to maintain her status as principal and, upon being transferred, cannot be demoted to the status of teacher, even though there be no diminution of salary. In the event of the transfer of such a teacher, such teacher's salary is governed by the provisions of Section 354, *supra*, and is not determined by the salary of the teacher who succeeds her in her old position, school, or grade.

(10) Section 123, *supra*, states in part that the County Superintendent of Education "shall nominate in writing for appointment by the county board of education, all principals, teachers and all other regular employees of the board." (Emphasis supplied.) Thus, the Superintendent's function is to nominate, the Board's function is to appoint. In my opinion, the

Superintendent does not have the power and authority to enter into an original contract of employment with a teacher, not previously employed in that school system, without the approval of the employing Board of Education. I am of the further opinion that a contract entered into without such approval is not a legal and binding contract.

Your tenth and last inquiry, therefore, is answered in the negative.

With the foregoing principles as a guide, consideration finally is given to the legal effect of the previously quoted entry found in the minutes of the Clarke County Board of Education. That entry states that the transfer of any teachers who were displaced was "confirmed" by the Board of Education, which indicates clearly that the transfers were made initially by the Superintendent who thereafter sought confirmation by the employing Board of Education. The Superintendent having no lawful authority to effect the transfers in the first instance and his action not being subject to ratification, in my opinion no legal transfers were effected. It follows that the teachers involved remain in their former position, school, or grade.

In answering your inquiries, I have not overlooked Act No. 34, Local Acts 1932, page 13, as amended, providing for the election of the County Superintendent of Education in Clarke County. However, said Act has no pertinency, since by Section 4 thereof said Superintendent has the same duties as County Superintendents of Education under the general laws of the State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 4, 1948.

Hon. Ward W. McFarland, Director,
State Highway Department,
CAPITOL.

Highways and Highway Department—Funds.

1. That portion of the \$2,500,000 State grant to the various counties for the construction of farm-to-market roads during the first year of the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944, which was not accepted by the various counties during that year, which ended on October 9, 1946, reverted to the Public Road and Bridge Fund.

2. Contracts subsequently entered into by the State Highway Department with various counties for the construction of farm-to-market roads, to the end that each county might receive its pro rata share of this \$2,500,000 State grant, even though it was not accepted within the one year period above

mentioned, are valid, legal, and binding contracts, payable out of the Public Road and Bridge Fund.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of July 26, 1948, is as follows:

"Reference is made to Section 13 of the Farm-to-Market Road Act of 1943 (Act No. 329, General Acts 1943, page 311), as amended first by Section 7 of Act No. 41, General Acts 1945, page 47, and later by Section 1 of Act No. 441, General Acts 1947, page 321. The pertinent part of this section, both as first and last amended, is as follows:

"* * * * * There is hereby appropriated of the moneys in the state treasury to the credit of the highway department, the sum of \$2,500,000 to be held in reserve by the highway department to be used, 1/67 in each county on county farm-to-market roads, without matching by the counties, but to be matched with a like sum of federal aid money in each county, when, and at any time within one year thereafter, the moneys appropriated by the Federal Aid Highway Act of 1944 and allotted to the State of Alabama for secondary, farm-to-market roads are available. Such state and federal moneys are to be spent in the counties, without requirement for county matching, if and only if the county shall have (1) set up and had approved by the state highway department a system of county farm-to-market roads, and (2) have in its employ a county engineer approved by the state highway department as provided in section 78 (12) of this article. Any amount allotted to a county and not accepted within the one year provided above, will revert to the general funds of the state highway department. * * * * * (Emphasis supplied.)

"It is to be noted from the emphasized portion of the above quoted provision that any amount of this \$2,500,000 State grant allotted to a county and not 'accepted' within the one year provided above will revert to the general funds of the State Highway Department. The one year provided above is the first year of the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944, which began on October 9, 1945.

"On October 9, 1946, the end of this one year period, there was an unobligated balance of \$1,964,690.46 remaining from this \$2,500,000 State grant to the various counties, due to the failure of certain of the counties to take the necessary steps, as set forth in the above quoted provision, to 'accept' this grant to them.

"Subsequent to that date, the State Highway Department, with the approval of the Governor, has, from time to time, entered into

contracts with these counties for the construction of county or farm-to-market roads, to the end that each county would receive its pro rata part of this \$2,500,000 State grant without regard to the time limit set in the above quoted provision, and as of today such a contract has been entered into with each and every county in the State.

"Actually, no part of this \$2,500,000 State grant which had not been 'accepted' on October 9, 1946, by the various counties was ever reverted to the general funds of the State Highway Department (the Public Road and Bridge Fund) so far as the books or records of the State Highway Department or the State Comptroller are concerned, and there is today in this fund an unexpended balance of \$1,198,412.47. As I see it, this amount, as a matter of law, is actually today a part of the general funds of the State Highway Department (Public Road and Bridge Fund), because of the reversionary clause contained in the above quoted provision.

"I respectfully request your opinion as to whether or not my belief about this matter is correct, and as to whether or not this amount of \$1,198,412.47 may now be used by the State Highway Department, with the approval of the Governor, just as any and all other monies in the general funds of the State Highway Department (Public Road and Bridge Fund) may be used.

"If you hold that this amount of \$1,198,412.47 is today a part of the general funds of the State Highway Department (Public Road and Bridge Fund) and may now be used by the State Highway Department, with the approval of the Governor, just as any and all other monies in such fund may be used, then, I, with the approval of the Governor, expect to make any payments that might become due between now and January 2, 1949, as a result of the contracts referred to above, out of such fund, and on January 2, 1949, expect to again earmark this amount of \$1,198,412.47 (less the amount so paid out on such contracts in the interim) to the various counties to which it is now earmarked. This will be done to the end that each and every county in Alabama will receive its full pro rata share of this \$2,500,000 State grant, without regard to the time limit imposed by the above quoted provision.

"It is my belief that I have the authority to do this, with the approval of the Governor, because of Title 51, Section 656, Code of Alabama 1940, as amended by Section 1 of Act No. 20, General Acts 1943, page 20, which provides that any residue of such fund, after provision shall have been made for the primary obligations against the same, 'may be used by the highway department, with the approval of the governor, in constructing public roads and bridges within the state as now and may hereafter be provided by law.' As you know, county or farm-to-market roads as defined in Section 1 of the Farm-to-Market Road Act of 1943, as amended by Section 2 of Act No. 41, supra, are public roads and bridges.

"I also respectfully request your opinion as to my legal authority to again earmark these monies to the various counties as I propose to do."

A careful perusal of the Farm-to-Market Road Act of 1943, as amended, discloses that the \$2,500,000 dealt with in the excerpt from Section 13 of said act, as amended, quoted in your letter of inquiry, was a State grant to the various counties (1/67 to each county), to be matched by a like amount of Federal aid money, but without any requirement for matching by the various counties, to enable them to start the farm-to-market road program during the first year of the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944, which, as you say, began on October 9, 1945.

While this grant was made to the counties, without any requirement for matching by them, it was not made unconditionally. In order for a county to receive its pro rata share of this grant, it had to (1) set up and have approved by the state highway department a system of farm-to-market roads, and (2) have in its employ a county engineer approved by the state highway department. These conditions were no doubt placed on this grant for the purpose of insuring that each county would have a proper farm-to-market road program and competent professional engineering advice in the accomplishment of the same.

The taking of these two steps by a county was deemed to be an acceptance by such county of its pro rata share of the \$2,500,000 State grant above referred to. The only reasonable construction which can be placed on the last sentence of the excerpt from Section 13, as amended, quoted in your letter of inquiry, is that a failure by a county to take these steps within the first year of the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944 amounted to a non-acceptance by such county of its pro rata share of such grant, thereby causing the same to revert to the general funds of the state highway department (the Public Road and Bridge Fund), the source from which said grant was made.

It is to be noted that said sentence uses the words "will revert." As I construe this last sentence, in the light of the entire excerpt quoted, it is mandatory; and, as a matter of law that part of the \$2,500,000 State grant which was not accepted by the various counties by October 9, 1946 (the end of the first year of the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944), reverted to the general funds of the state highway department (the Public Road and Bridge Fund) to be thereafter expended as any other monies in such fund. In other words, on October 9, 1946, a county which had not then taken the necessary steps to accept its pro rata share of this grant no longer had any claim to the same as a matter of right.

However, as you pointed out in your letter of inquiry, under Title 51, Section 656, Code of Alabama 1940, as amended by Section 1 of Act No. 20, General Acts 1943, page 20, any residue of the Public Road and Bridge

Fund, after provision has been made for the primary obligations against the same, "may be used by the highway department, with the approval of the governor, in constructing public roads and bridges within the state as now and may hereafter be provided by law."

It is obvious from Section 1 of the Farm-to-Market Road Act of 1943, as amended by Section 2 of Act No. 41, General Acts 1945, page 47, that farm-to-market roads are "public roads."

That being true, it was within the unquestioned power and authority of the State Highway Department, with the approval of the Governor, to enter into contracts with the various counties which had not accepted their pro rata shares of the \$2,500,000 State grant by October 9, 1946, for the construction of farm-to-market roads in such counties, in an amount equal to their pro rata shares of said grant, payment for the same to be made out of the Public Road and Bridge Fund, to the end that each county in the State might receive its full pro rata share of said grant, without regard to the time limit placed on the acceptance thereof by the last sentence of the excerpt from Section 13 of the Farm-to-Market Road Act of 1943, as amended, quoted in your letter of inquiry. Such contracts amounted to nothing more nor less than an expenditure of monies in the Public Road and Bridge Fund for the construction of public roads.

Premises considered, I advise you specifically as follows:

1. On October 9, 1946, the end of the first year of the postwar Federal Aid Program provided in the Federal Aid Highway Act of 1944, the unobligated balance of \$1,964,690.46 remaining from the \$2,500,000 State grant reverted, as a matter of law, to the general funds of the state highway department (the Public Road and Bridge Fund) to be thereafter expended as other monies in said fund.

2. Consequently, the \$1,198,412.47 now remaining from this grant is, as a matter of law, a part of the Public Road and Bridge Fund to be expended as other monies in said fund.

3. Contracts entered into by the State Highway Department, with the approval of the Governor, with various counties of the State, subsequent to October 9, 1946, for the construction of farm-to-market roads in such counties are valid, legal, and binding contracts payable out of the Public Road and Bridge Fund.

4. You may legally pay the amounts that might become due on such contracts, as they become due, out of the Public Road and Bridge Fund, and if you so desire, as you state in your letter of inquiry, on January 2, 1949, you may again earmark the amount of \$1,198,412.47 above referred to (less the amount paid on such contracts between now and then) to the various counties to which it is now earmarked, to the end that each county in the State may receive its full pro rata share of this \$2,500,000 State grant, without regard to the time limit placed on the acceptance

thereof by the last sentence of the excerpt from Section 13 of the Farm-to-Market Road Act of 1943, as amended, quoted in your letter of inquiry.

5. In any event, all such contracts are valid, legal, and binding contracts payable out of the Public Road and Bridge Fund.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1948.

Hon. P. E. Day,
County Judge,
Walker County,
Jasper, Alabama.

Court of County Commissioners—Expenditure of Funds—
County Court of Walker County.

Act No. 533, Local Acts 1927, page 381; Title 12, Section 123,
Code of Alabama 1940.

There is no provision of law authorizing the county governing body of Walker County to purchase, from funds of the county, stationery, envelopes, stamps, typewriter, and other office incidentals for the use of the Judge of the County Court of Walker County.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of May 25, 1948, is as follows:

"The County Board of Revenue of this County has asked me to write you and ask your opinion as to whether they have the authority to furnish office incidentals, such as letterheads and envelopes and stamps and typewriter for the County Judge of this County."

In my opinion, your inquiry must be answered in the negative.

The County Court of Walker County was established by Act No. 533, Local Acts 1937, page 381, that portion of such act pertinent to your inquiry providing as follows:

"Section 6 1-2. That such County Judge shall when not otherwise engaged in the discharge of the duties of the office at all reasonable times occupy an office in the Court House to be provided by the County; and it shall be unlawful for such Judge to practice

law or be connected in the practice of law with any lawyer or law firm, it being the duty of such Judge to give his entire time to the discharge of the duties of his office. And said County Judge is hereby given authority of determining what papers connected with the proceedings before him shall be recorded."

Subsequent amendments to such act as found set out in Act No. 424, Local Acts 1931, page 196; Act No. 278, Local Acts 1932 (Special Session), page 113; Act No. 22, Local Acts 1939, page 8, and Act No. 429, Local Acts 1945, page 184, affect only the jurisdiction and authority of such court or the salary of the Judge thereof and, in my opinion, are in no sense pertinent to your inquiry.

Courts of County Commissioners, Boards of Revenue, or other county governing bodies, being creatures of legislative enactment, vested with no inherent powers or authority, can only exercise such power, authority or jurisdiction as is expressly granted them by law. Therefore, in order to lawfully make an expenditure such as that mentioned in your inquiry, the county governing body must be able to point to specific legislative authority therefor. This authority must be found within the provisions of the Local Act, Act No. 533, supra, creating the County Court of Walker County, or within the provisions of the general law relative to the power, authority and jurisdiction of county governing bodies with reference to the expenditure of public funds.

The above-quoted portion of Act No. 533, supra, provides only that the Judge of such County Court shall occupy an office in the courthouse "to be provided by the County." In an opinion of this office rendered to the Honorable V. H. Carmichael, Judge of the County Court of Walker County, under date of June 17, 1932, Report of Attorney General, Office Edition, Volume 10, page 250, it was held that the above provision of law requires that the county governing body of Walker County furnish the Judge of the County Court with an office. To me, this means office space, together with the necessary office furniture required therein. In my judgment, such opinion could not be extended to include office incidentals, such as stationery, envelopes, stamps, and typewriter, as mentioned by you in your inquiry.

I am, therefore, of the opinion that no authority may be found within the provisions of Act No. 533, supra, authorizing the expenditure about which you inquire.

Considering the provisions of the general law relative to the duty of the county to furnish certain of the county officers with stationery and other items of office equipment, it is provided by Title 12, Section 123, Code of Alabama 1940, that:

"The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official

business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

This statute specifically names those officers of the county to be furnished, by the county, those items described therein. The judges of county courts, of the nature of that here considered, not being named therein, it is my opinion that no authority exists for such expenditure under the provisions of the general law.

No authority being found either within Act No. 533, *supra*, nor within the provisions of the general law relative to such expenditure, it is my opinion that such expenditure may not lawfully be made. Cf. Quarterly Report of Attorney General, Volume 17, page 306; Quarterly Report of Attorney General, Volume 10, page 183; Quarterly Report of Attorney General, Volume 6, page 108, and Quarterly Report of Attorney General, Volume 16, page 261.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1948.

Hon. Walter B. Jones,
State Geologist,
Alabama Museum of Natural History,
University, Alabama.

Geological Survey—Funds.

Title 55, Sections 103-104, Code of Alabama 1940; Title 55, Sections 245-254, Code of Alabama 1940.

1. The Geological Survey may require a nominal charge for the issuance of publications of such agency.

2. The funds accruing therefrom may be utilized by the Geological Survey for the purpose of defraying expenses of the Survey, for library purposes, or otherwise.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of January 30, 1948, is as follows:

"Many years ago Dr. Eugene A. Smith found it advisable to place a nominal charge on some of our more costly publications,

in order to retard their distribution. We have followed that custom through the years.

"Governor Johnson gave his permission, and later Judge Mayfield rendered an opinion that the revenue derived from the sale of publications, maps, et cetera could be used for the benefit of the Survey Library.

"During the war Dr. Lloyd, who was operating the Survey in my absence, elected to turn in all such monies to the General Fund.

"Is there any provision of law which would permit us to continue to utilize funds received from the sale of maps and other publications for subscription to journals, magazines, et cetera, for binding, for purchase of missing numbers in journals and magazines, and for general use of our research library? If so, please let me know how a formal official request for your opinion might be worded.

"The little money which accrues in the map fund and is thus turned in to the State Treasury means little to the General Fund. I feel sure that there is a sufficient amount to take the burden of the library entirely off of our appropriation. Therefore it means a great deal to us.

"I will be in Montgomery the morning of February 6 and would like to call by to see you shortly after 8:00 o'clock in the hope that we might further discuss this matter."

In answer to your inquiry, I would advise that I find no provision of law specifically authorizing or providing that the funds received by the Geological Survey from the distribution of maps and bulletins of the Survey accrue to and may be utilized by the Survey for maintenance of its library, or other functions. However, I would also advise that, in my opinion, it is not required by law that such funds be covered into the State Treasury to the credit of the general fund, and that the State Geologist, as head of the Geological Survey, may, if he sees fit, utilize such funds for the upkeep and maintenance of the Survey library.

The statutes governing the Geological Survey are found set out in Title 55, Sections 245-254, Code of Alabama 1940, with the only amendment thereto, that concerning the salary of the State Geologist, not being pertinent to the question here considered. Section 246, *supra*, provides that the State Geologist shall, at each regular session of the Legislature, report the progress of his explorations, examinations, etc., together with such maps or charts as may be necessary for illustrations. Such statute further provides, in part, that:

"* * * * He shall also from time to time prepare or cause to be prepared monographs, special reports or bulletins of the geology and varied resources of the state which shall be printed and published under the provisions of article 4, chapter 4 of this title."

Section 251, *supra*, provides for the compilation, printing and publication of bulletins of the Survey, while Section 252, *supra*, provides for the preparation of topographic maps of the different localities of the State. It is to the above publications that I assume you refer in your inquiry.

In your request, you advise me that for a long period of time the Survey has made a practice of making a nominal charge for the issuance of the more costly of the publications listed above. You inquire as to whether the Survey may utilize the funds so derived for the maintenance of its research library. In my opinion, it may.

It is my opinion that the preparation, printing and publication of the reports, bulletins and maps required by law of the Survey is an administrative function of such agency. It is likewise pertinent to note that the cost of all such preparation, printing and publication is paid from money appropriated to the Geological Survey within the general appropriation bill. Such being true, it is my opinion, that if the State Geologist determines that it will work to the more efficient operation of the Survey to charge a nominal sum for the issuance of the more costly publications, such a charge may be made and the money thereby accruing would not revert to the general fund but would accrue to the benefit of the Survey, to be used in the administration thereof for library purposes, or otherwise.

The only provision of law that might be construed as requiring a reversion of such funds to the general fund would be Title 55, Section 103, Code of Alabama 1940, which provides, in part, that:

"All fees, receipts, and income collected or received by any department, board, bureau, commission, agency, or office or institution of the state shall be paid into the state treasury or deposited in an approved state depository to the credit of the general fund of the State of Alabama or to the credit of a special fund if the latter is required by law. * * * *"

In my opinion, the above-mentioned "fees," "receipts," and "income" do not include, nor bear any relation to, funds derived from such a source as that here considered.

Such proceeds could in no way be deemed "fees." Neither do such proceeds, in my opinion, constitute a "receipt" or "income" within the meaning of this statute. "Income," in its popular signification, is the return in money which one receives from an investment of capital, as distinguished from capital itself, that is, net profit or net gain. 20 Words and Phrases (Per. Ed.), Income, page 499. In Webster's New International Dictionary, Second Edition, page 1258, the word "income" is defined as something that comes in as an addition or increment, and it is stated that a synonym of the word "income" is the word "receipt." Certainly, it cannot be said that the proceeds here under consideration represent a net profit or net gain realized from an investment of capital, for the reason that it was never contemplated that the money from which

the cost of the printing and publication of such documents was paid was to be utilized for investment purposes, but rather that such money was to be expended in defraying the operating expenses of the Geological Survey.

It should here be pointed out that under the provisions of Title 55, Section 104, Code of Alabama 1940, all unencumbered balances of all appropriations shall revert to the State Treasury at the end of each fiscal year, and to the credit of the general fund or the special fund from which the appropriation, or appropriations, were made. Therefore, if any unencumbered balance remains of the appropriation made to the Geological Survey at the end of the fiscal year, such amount reverts to the general fund from whence it came. However, in my opinion, any funds derived from the distribution of documents, the publication and printing of which was paid from funds of the Survey, would not revert to the general fund, but may be utilized by the Survey for defraying publication expenses, library purposes, or otherwise.

In your request, you inform me that such has been the custom and procedure followed by the Survey for many years. The decisions of our courts are to the effect that the administrative construction of the laws by agencies created by law to administer them is to be given much weight, especially when long continued. *First National Bank of Birmingham v. Basham*, 238 Ala. 500, 191 So. 873; and in the case of *State ex rel. Fowler v. Stone*, 237 Ala. 78, 185 So. 404, it was held by the Supreme Court of Alabama that when there is doubt about the proper construction of a statute or constitutional provision, contemporaneous construction placed thereon by the courts, by officers whose duty it was to construe them, and by the executive departments, and the popular interpretation as exemplified in practice for a number of years should be looked to in reaching a conclusion as to the proper construction to be given such statute. Many of the decisions of our courts testify to the correctness of the above rule of law.

It should be pointed out that it is not the intent or purpose of this opinion to authorize, permit or condone the Geological Survey engaging in the preparation, printing and distribution of maps or other publications as a business enterprise for the purpose of deriving revenue, utilizing money appropriated to the Survey by the Legislature for the operation of such agency, but rather that such opinion is to the effect that in the operation of the Survey, the publication of such documents as are contemplated by law is an administrative or ministerial function of the Survey, and that a nominal charge may be made for such documents and the proceeds derived therefrom applied or utilized in the payment of the expenses of such agency.

It should also be pointed out that, if, as stated by your letter of inquiry, the collection of such nominal sums will produce sufficient funds to provide for the Survey library, such is a fact that should be brought to the attention of and considered by the Legislature when making the

annual appropriation to the Survey, in order that duplicate provisions may not be made for such purpose.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1948.

Hon. Thomas W. Jones,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Licenses.

Beer distributors liable for license required of "transient dealers" on facts stated.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion is as follows:

"Section 609, Revenue Code 1941.

"Sales and delivery of beer distributor to licensees.

"Beer distributors of this city are required by the License Inspector to have license under Section 609, 1941 License Code, if on their regular rounds of delivery, they sell and deliver to persons or customers who have not previously ordered or bought the goods.

"Please advise me if sales under these circumstances bring them under this section as transient dealers.

"Keith Distributing Company of this city requested me to make this inquiry but I find no record of having done it."

I am of the opinion that your inquiry must be answered in the affirmative.

I am assuming that the customers referred to in your request are retail dealers who offer for resale the beer bought from the distributors' trucks.

Your attention is invited to the following excerpt from Title 51, Section 609, Code of Alabama 1940, which reads as follows:

"§609. Transient dealers. * * * * *. Definition of transient vendor or dealer: When used in this section, the words 'transient dealer' shall be held to include any person or persons who shall be embraced in any of the following classifications: All persons acting for themselves or as an agent, employee, salesman, or in any capacity for another, whether as owner, bailee or other custodian of goods, wares, and merchandise, and going from person to person, dealer to dealer, house to house, or place to place, and selling, or offering to sell, exchanging or offering to exchange, for resale by a retailer, any goods, wares and merchandise. * * * * *."

Therefore, when the distributors allow their salesmen to sell beer and make deliveries from their trucks, the distributors are not conducting a regular wholesale business, but come within the classification of a transient dealer.

Your attention is also invited to opinions of this office found in Quarterly Report of Attorney General, Vol. 2, page 164, and Vol. 7, page 168, which hold that wholesalers and distributors of malt and brewed beverages, who do business as transient dealers, are liable for the license required of transient dealers.

In consideration of the above, I am of the opinion that beer distributors who sell and deliver such beer from their delivery trucks are liable for the license required of transient dealers under the provisions of Title 51, Section 609, Code of Alabama 1940, even though he also makes deliveries of previously ordered beer.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1948.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Filing tax—Contracts.

An executory contract which conveys no present interest in real or personal property is not subject to filing tax.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion is as follows:

"I am enclosing a copy of an instrument filed in my office for record on this date.

"At the time this instrument was filed, it was my opinion that a tax of \$5.00 should be paid on the cash payment and a tax of \$7.50 on the deferred balance; inasmuch as this agreement is binding on both the seller and the purchaser.

"Will you please inform me whether I am correct in assuming that the instrument is taxable, or whether it is an executory contract requiring no tax.

"I shall appreciate your opinion in this matter at your earliest convenience, and shall also appreciate your returning the enclosed copy to me."

I have carefully examined the contract between George A. Devendorf and Sam Morgan that you submitted with your request, and I am of the opinion that said contract is an executory contract which requires no filing tax.

In my opinion, this is an executory contract which does not convey any real or personal property or any present interest therein as contemplated by our deed or mortgage filing tax statutes. Your attention is invited to the following excerpts from these statutes.

Title 51, Section 618, Code of Alabama 1940, reads in pertinent part as follows:

"§618. Deeds, bills of sale, etc.; recordation.—No deed, bill of sale, or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, * * * * * shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: * * * * *"

Title 51, Section 619, Code of Alabama 1940, reads in pertinent part as follows:

"§619. Mortgages, deeds of trust, etc.; recordation.—No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this state, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record to-wit: * * * * *"

Your attention is further invited to paragraphs 2, 3, and 4 of said contract, which provide as follows:

"2. That the Purchaser shall pay to the Owner, on the execution of this instrument, the sum of \$5000.00, the receipt whereof is

hereby acknowledged by the Owner, as a part of the purchase price; and the Purchaser shall pay to the Owner, as the balance of the purchase price the sum of \$5000.00 on the date of the conclusion of this contract, except that should the title to said property, or any part thereof, prove incurably defective, then said above \$5000.00 shall be returned to purchaser.

"3. That on the date of the conclusion of this contract, and on the payment by the purchaser to the Owner of the aforesaid balance of the purchase price, the Owner shall execute and deliver to the Purchaser a good and sufficient warranty deed, containing the usual covenants and warranties, conveying a good and merchantable title to the aforesaid premises and property.

"4. The date for the conclusion of this contract shall be the 17 day of November, 1947, excepting that this provision regarding the date for the conclusion of this contract may be extended for a reasonable time, not exceeding 30 additional days, on the mutual agreement of the parties hereto."

It is evident from a reading of the above that the contract is executory, as there is not a transfer of interest in real and personal property. The title to the property described in the contract will not pass until the terms of the contract are complied with. This contract was entered into on October 17, 1947, and the contract specifically states that the owner shall execute and deliver to the purchaser a good and sufficient deed only after the purchaser pays the balance on November 17, 1947.

This office has, on numerous occasions, held that instruments that convey no real or personal property, or any present interest therein, are not subject to either the deed or the mortgage filing tax. See Quarterly Report of Attorney General, Vol. 16, page 166; Quarterly Report of Attorney General, Vol. 19, page 314; and Quarterly Report of Attorney General, Vol. 25, page 112.

Therefore, I am of the opinion that this contract is not subject to the filing tax imposed for the privilege of record under the provisions of Title 51, Sections 618 and 619, Code of Alabama 1940, inasmuch as this contract did not, to quote the language of the statute, "convey any real or personal property within this state" or "convey any interest therein."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1948.

Hon. Lester L. Holley,
Sheriff, Elmore County,
Wetumpka, Alabama.

Prisoners and Prisons—County Jails—Authority to Employ Matron—Title 45, Sections 3, 43, 74, 165, 184, Code of Alabama 1940—Rules and Regulations Governing County and City Jails, State of Alabama, Promulgated and Established by the Department of Corrections and Institutions, Adopted and Approved March 1, 1945.

1. Where the Department of Corrections and Institutions has promulgated rules and regulations making provision for the employment of a matron in the county jail under stated conditions, the sheriff may employ said matron when the stated conditions are met.

2. Payment for the services of said employee is an item of county expense.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of July 1, 1948, is as follows:

"Please advise me whether or not the Sheriff can legally employ a Matron for the County Jail and if so can the county legally pay for her services.

"Your usual prompt attention will be greatly appreciated."

Your question is answered in the affirmative under the conditions hereinafter stated.

By Title 45, Section 3, Code of Alabama 1940, the functions and duties of the Department of Corrections and Institutions incorporate in part the following:

"* * * To manage, supervise and control all penal and correctional institutions, except as otherwise herein provided. * * * * * To promulgate such rules and regulations necessary to hygiene, sanitation, cleanliness, healthfulness, feeding of prisoners, management and security of all prisons and jails. * * * * *"

Title 45, Section 43, Code of Alabama 1940, reads as follows:

"The director shall provide female guards for female convicts."

Title 45, Section 74, Code of Alabama 1940, reads as follows:

"All laws of the state and rules of the department in regard to state convicts shall apply also to county convicts as far as applicable, except as otherwise provided by law."

Title 45, Section 165, Code of Alabama 1940, reads as follows:

"The director may formulate and promulgate such rules and regulations as it may deem necessary with reference to the hygiene, sanitation, cleanliness, healthfulness, feeding of prisoners, management and security of all jails, including town and city prisons, and almshouses."

Title 45, Section 184, Code of Alabama 1940, reads as follows:

"The expense incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail, prison, and almshouse in this state shall be paid out of the funds of the county in which such institution is located and of the town or city, if the institution be a town or city institution." (Emphasis added.)

Under "Rules and Regulations Governing County and City Jails, State of Alabama, Promulgated and Established by Department of Corrections and Institutions, Adopted and Approved March 1, 1945," the State Department of Corrections and Institutions has promulgated certain rules relating to the management of city and county jails. Under Rule 34 thereof the following is noted:

"All jails, in which women prisoners are confined, must have a woman attendant available for at least two visits a day or oftener if necessary. In jails where there are as many as ten women confined at one time, a matron or woman attendant must be on duty."

Since it is apparent from the authorities cited above that the Department of Corrections and Institutions has been clothed with authority in the matter of appointment of female guards or matrons of county jails, and since they have seen fit to promulgate Rule 34, cited supra, making provisions for such female guards or matrons under stated conditions, it is my opinion that the sheriff may employ said female guards or matrons when the conditions set forth in Rule 34 are met. Since the sheriff is charged by law with this duty, and since the expenses of the county jail are paid out of funds in the county, it is my further opinion that the expense of employment of such a female guard or matron is a valid claim for payment by the county when said expenses are reasonable and in line with the conditions of Rule 34, cited supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 5, 1948.

Hon. Bert E. Thomas, Director,
Department of Conservation,
CAPITOL.

Hunting and Fishing Licenses—Exemptions—Veterans.

Act No. 502, General Acts 1945, page 727; Title 7, Section 41 (1), Cumulative Pocket Part, Code of Alabama 1940. A person serving as a member of the Armed Forces of the United States of America is not exempt from having to purchase hunting and fishing licenses to hunt or fish within the State of Alabama since the United States is not engaged in war.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1947, is as follows:

"On 6 July 1945 the Legislature of Alabama enacted into law a bill providing that hunting or fishing licenses were not required of members of the armed forces of the United States of America during any period of time in which the United States of America is engaged in a war. This act appears on page 727 of the general acts of Alabama of 1945. It has been brought forward into the 1945 supplement of the code as section 41 (1).

"We have received many inquiries regarding this law, particularly as to whether or not the United States of America is still engaged in a war so far as the operation of this statute is concerned.

"I should like to have your official opinion clarifying this question.

"Your usual prompt attention in handling such matters will be greatly appreciated."

The Act referred to in your request reads, in part, as follows:

"Section 1. No person serving as a member of the Armed Forces of the United States of America shall be required to procure a hunting license or a fishing license to hunt or fish within the State of Alabama during any period of time in which the United States of America is engaged in a war."

In the case of *Zinno v. Marsh et al*, 36 N.Y.S. (1942), the court made the following comment on the words, "during the World War": "Those words have come to have a clear and common meaning in our language—to have been used commonly to describe the period beginning with our

entry in World War I and ending with the Armistice, November 11, 1918, and they have become to be understood universally it must be assumed that the legislature used those words in the sense in which they are naturally and ordinarily so used. The statute was designed to give a preference to those who risked their life for their country in war time" See Quarterly Report of Attorney General, Vol. 42, page 32, and Opinion to Honorable Coma Garrett, Jr., Judge of Probate, Clarke County, under date of April 5, 1948.

It is my conclusion that the term "during any period of time in which the United States of America is engaged in a war, has similar meaning as the term "during the World War" used in the Zinno Case, supra, that is during a period of time in which the United States was actually engaged in hostilities with another country.

It is my opinion that the United States is not now engaged in a war within the meaning of the term used in Act No. 502, supra. It, therefore, follows that the exemption of a member of the Armed Forces of the United States from obtaining a hunting and fishing license to hunt and fish within the State is not now applicable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 6, 1948.

Hon. Gordon Persons, President,
Alabama Public Service Commission,
CAPITOL.

Public Service Commission—Motor Carriers—Motor Vehicles
—Automobiles—Hospitals.

Ambulance service, furnished by the use of motor vehicles operating beyond the corporate limits or police jurisdiction of a municipality, is subject to regulation by the Alabama Public Service Commission.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of November 21, 1947, is as follows:

"We have had an inquiry from the Veterans Administration as to whether or not an ambulance comes under the provision of the 1939 Motor Carrier Act as to rates, rules and regulations, the same as any other company carrying passengers for hire.

"We have very carefully read the Act and find no exception for ambulances and as it appears that an ambulance does transport passengers for hire, it would seem, in the absence of any specific exemption, that such companies would have to obtain a certificate of convenience and necessity from the Public Service Commission, in which case their rates and service would be fixed. The Veterans Administration states they have cases where the ambulance companies involved have deliberately raised rates when veterans were being transported."

Section 1, Paragraph F, Act No. 669, General Acts 1939, page 1064, approved July 5, 1940, known and cited as the "Alabama Motor Carrier Act of 1939," provides:

"The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or other arrangement, to transport passengers or property, or any class or classes of property for the general public in the State of Alabama by motor vehicle for compensation, whether over regular or irregular routes, or whether between fixed termini or not, including such other motor vehicle operations of carriers by rail or water and/or express and forwarding companies under this Act."

Section 2, A. (2), "Alabama Motor Carrier Act of 1939," provides for the exemption of:

"Motor vehicles for hire while operating wholly within the limits of a city or incorporated town or within the police jurisdiction thereof; or between two or more incorporated towns or cities whose city limits join or are contiguous or whose police jurisdictions join or are contiguous."

Title 48, Chapter 4, Code of Alabama 1940, subjects to regulation, by the Alabama Public Service Commission, certain public utilities other than transportation companies or motor vehicle carriers. In defining the term "utility" as used in that chapter, Title 48, Section 302, Code of Alabama 1940, in part provides:

"* * * (2) (b) or any motor or other vehicle, not operated on tracks, for the transportation or conveyance of or for the public of passengers for hire between any points served by a street or interurban railway and any other point served by the same street or interurban railway or by the same system of street or interurban railways, not including hearses, ambulances, taxicabs, hotel or sightseeing busses. * * * *"

(Emphasis supplied.)

Thus, it is seen from Sections 302 and 2, A. (2), supra, that hearses, ambulances, taxicabs, and hotel or sightseeing busses are exempt from regulation by the Alabama Public Service Commission while operating wholly within the corporate limits or police jurisdiction of a municipality. See Biennial Report of Attorney General, 1934-1936, page 624. When

operating beyond those limits, in my opinion, such motor vehicles are subject to such regulation. See Quarterly Report of Attorney General, Vol. 17, page 342.

The so-called "Alabama Motor Carrier Act of 1939," supra, contains no exemption of ambulances from the operation of that Act. Their only exemption springs from Section 2, A. (2), supra, which exempts them only in so long as they operate within the corporate limits or police jurisdiction of a municipality. It is a matter of common knowledge that ambulances transport passengers, albeit sick passengers, and property for compensation. In an opinion found in Quarterly Report of Attorney General, Vol. 44, page 7, it has previously been held that ambulance service furnished by use of aircraft is, by virtue of Act No. 269, General Acts 1945, page 414, approved July 7, 1945, subject to regulation by the Alabama Public Service Commission.

Therefore, in my judgment, ambulances are subject to the regulatory powers and authority of the Alabama Public Service Commission when operating beyond the corporate limits or police jurisdiction of a municipality.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 6, 1948.

Mrs. Marie B. Owen, Director,
Department of Archives and History,
Montgomery 5, Alabama.

Department of Archives and History—Expense of Publication of Official and Statistical Register—Governor's Emergency Fund—Act No. 320, General Acts 1947, page 183—Constitution of Alabama 1901, Section 72, Title 55, Sections 105, 102, Code of Alabama 1940.

Governor has no authority to pay for the publication of the Official and Statistical Register prepared by the Department of Archives and History out of any monies in the general treasury of the State not otherwise appropriated.

Opinion by Assistant Attorney General Gallion.

Dear Mrs. Owen:

Your request for an official opinion, bearing date of June 28, 1948, is as follows:

"In keeping with the law regulating the affairs of the Department of Archives and History, I have prepared material for the

Official and Statistical Register and have not yet been able to get it published. The Legislature did away with the Printing and Binding Fund out of which, my understanding is, that former issues of the Register have been paid for. On April 9th, of this year, I wrote to the Governor requesting his approval of the publication of the book but was advised by Col. Ira B. Thompson, his legal adviser, that the Governor did not have money in his Emergency Fund to meet the cost which would be \$4,000 or \$5,000 for 1,000 copies.

"It was proposed that I should pay for this publication out of the appropriation made for the maintenance of this Department, which is only \$10,000 a year, exclusive of salaries. Of course, that was entirely out of the question and I am writing to ask you if the Governor, who is interested in the publication of the Register, may not approve its publication out of any monies in the General Treasury of the State not otherwise appropriated. This is the only chance of having the Register printed that carries all the official statistics that the press, County and State officials and public libraries depend upon for authoritative information concerning State personnel and other matters.

"I hand you herewith the correspondence I have had with the Governor's office concerning this matter."

I have carefully perused the Appropriation Bill passed by the 1947 Session of the Legislature which is officially designated as Act No. 320, General Acts 1947, page 183. It is noted therein that no specific appropriation is made for the publication of the Official and Statistical Register which you refer to. Neither is there an appropriation for a Printing and Binding Fund which has covered the item of expense you refer to in other years.

By the Constitution of Alabama 1901, Section 72, it is provided as follows:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof; and a regular statement and account of receipts and expenditures of all public moneys shall be published annually, in such manner as may be by law directed."

Since the Legislature has not made provisions for the appropriation of funds which specifically covers the item of expense you refer to, I can find only two sources to which you may look. The first is the Department of Archives and History appropriation "For other expense . . . \$10,000" noted in the Appropriations Bill cited supra. You state that use of said funds is out of the question. The second source to which you may look is the Governor's Emergency Fund of \$100,000 which is provided for in said Appropriation Bill. Relative thereto, Title 55, Section 105, Code of Alabama 1940, reads in part as follows:

"* * * Any department, board, bureau, commission, agency, office or institution of the state or any person or persons in charge of any activity in which the state is interested, desiring an allotment out of said appropriation, shall present such request in writing to the department of finance with such information as it may require, and, such request shall be handled and allotments may be made pursuant thereto as in the case of regular allotments. Such allotments shall be made only for any purpose authorized by law for which no specific appropriation has been made or for which inadvertently an insufficient appropriation has been made."

The "regular allotments" referred to above are provided for in Title 55, Section 102, Code of Alabama 1940, and in cases such as the instant one, release of an allotment would require the Governor's approval. Thus, the matter of release of this source of funds is one that directs itself strictly to the Department of Finance and the Governor. You state in this regard that you are advised that there is insufficient money in the Governor's Emergency Fund to meet your request.

I regret to inform you that I am unable to find any other source of authority which would cover the cost of publication which you refer to.

As seen by the Constitution of Alabama 1901, Section 72, cited supra, no money may be paid out of the State Treasury except upon appropriation made by law. I find no law under which authority might vest in the Governor to pay for the publication of the Official and Statistical Register out of any monies in the general treasury of the State not otherwise appropriated, and you are so advised accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 9, 1948.

Hon. James T. Beeland,
Judge of Probate,
Butler County,
Greenville, Alabama.

Counties—County Engineers—Highways and Highway Department—Salaries—Statutes.

1. If a county, in the employment or appointment of a county engineer, complies with all of the provisions of Title 12, Chapter 5, Sections 67-72, Code of Alabama 1940, the State Highway Department may participate in the payment of his salary to the extent of one-half of \$4,000 per annum, the maximum amount fixed by said statutory provisions, notwithstanding the fact that the county governing body supplements his salary under Title 23, Section 43, Code of Alabama 1940, which it has the authority to do.

2. Opinion to Hon. Ward W. McFarland, State Highway Director, under date of January 15, 1948, overruled and withdrawn.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of July 29, 1948, is as follows:

"I am familiar with Title 12, Chapter 5, Sections 67-72, Code of Alabama 1940, dealing with the employment of a county engineer by the various counties of the State, and also with the opinion which you rendered to Hon. Ward W. McFarland, State Highway Director, under date of January 15, 1948, holding:

" 'Where a county engineer is appointed pursuant to a local act and where his salary exceeds \$4,000 per annum, Highway Department is not authorized to participate in payment thereof. Title 12, Sections 67-72, Code of Alabama 1940.'

"My county has employed or appointed a county engineer in strict conformity with the above cited statutory provisions. His salary is currently fixed at \$4,000 per year, as provided by Section 67, *supra*, and the State Highway Department pays one-half of this amount pursuant to the provisions of Section 70, *supra*.

"I request your official opinion on the following questions:

"1. May the county governing body of my county, pursuant to the authority vested in it by Title 23, Section 43, Code of Alabama 1940, or any other provision of law, supplement the salary of our county engineer out of the funds of the county available for public road and bridge purposes, over and above the amount of \$4,000?

"2. If you hold that we may so supplement his salary, would the fact that we do supplement his salary affect in any way the authority of the State Highway Department to contribute one-half of the amount of \$4,000 which is paid to him as provided by Section 67, *supra*?

"I call your attention to Section 72, *supra*, which states that Chapter 5, of which it is a part, 'is not mandatory but is discretionary, remedial, cumulative, and provides additional authority for the betterment of all county public road systems.' As I understand the law, any county governing body, pursuant to its broad, general authority over public roads and bridges, may employ or appoint a county engineer without regard to Chapter 5, *supra*. If I am correct in this understanding, it seems to me that, especially in view of the provisions of Section 72, *supra*, a county governing body should be able to employ or appoint an engineer in strict compliance with the

provisions of Chapter 5, *supra*, and supplement his salary over and above the amount of \$4,000, as provided by Section 67, *supra*, with the State Highway Department still having the right, pursuant to Section 70, *supra*, to contribute one-half of the amount of \$4,000 toward his salary, without doing any violence whatsoever to either the letter or the spirit of the law."

Title 23, Section 43, Code of Alabama 1940, invests in county governing bodies legislative, judicial, and executive powers in regard to public roads, bridges and ferries of their respective counties; and the exercise of these discretionary powers cannot be restrained or reviewed unless there has been a fraudulent, corrupt or unfair conduct of the business of the county. *Ensley Motor Car Co. v. O'Rear*, 196 Ala. 481, 71 So. 704. In that case, which construed the then applicable predecessor statute to Section 43, *supra*, the court spoke as follows as to the right of a county to employ a county engineer in the construction, maintenance, superintendence, and inspection of public roads and bridges in the county:

"With the more recent demands for better roads and more secure bridges and ferries in all sections of the country—in the rural or country districts, and often at points remote from the county site or market places, as well as in urban localities—greater engineering skill and improved machinery and facilities are necessary, in the construction and maintenance of these public agencies. If a board of revenue or court of county commissioners may employ skilled architects to make plans for county ferries, bridges, and buildings, it may provide for like superintendence and inspection. * * * * *"

The court cited and quoted with approval from the earlier case of *Board of Revenue of Covington County v. Merrill*, 193 Ala. 521, 69 So. 971.

The above quoted statement of the Supreme Court, true when made in 1916, is even more true today, with the ever increasing demands for modern public roads and bridges to accommodate the vast and steadily increasing number of high speed automobiles, trucks, and buses.

Thus, it is apparent that a county governing body, under Section 43, *supra*, could employ or appoint a county engineer and fix his compensation in such an amount as it deemed reasonable, prior to the enactment in 1939 of the statute of which Title 12, Chapter 5, Sections 67-72, Code of Alabama 1940, are a codification. Cf. Quarterly Report of Attorney General, Vol. 2, page 215, and Quarterly Report of Attorney General, Vol. 37, page 99. It can still do so today, unless these statutory provisions have the effect of limiting these broad powers of county governing bodies.

These statutory provisions authorize the county governing body of each of the several counties to employ or appoint a county engineer for a period not exceeding two years, at a salary to be fixed by such body at not in excess of \$4,000 per annum; fix his qualifications; prescribe his duties; and provide that when such an engineer is employed or ap-

pointed in accordance therewith, the State Highway Director, upon application of the county governing body, may authorize the State Highway Department to participate in the payment of his salary in an amount equal to one-half of the salary therein provided for.

Unquestionably, they were enacted in 1939 for the purpose of encouraging the various counties to employ competent engineers.

Section 72 of Chapter 5, *supra*, reads as follows:

"This chapter is not mandatory but is discretionary, remedial, cumulative, and provides additional authority for the betterment of all county public road systems." (Emphasis supplied.)

Before answering specifically the question presented in your letter of inquiry, it is necessary to determine the effect, if any, of these statutory provisions upon the broad powers of county governing bodies under Section 43, *supra*.

Remedial statutes must be liberally construed.. 18 Ala. Dig., Statutes, Key No. 236, and cases there cited.

In 50 American Jurisprudence, Statutes, Section 393, we find the following statement of the rule as to the construction of remedial statutes:

"As in the case of all statutes, the primary rule of construction of remedial statutes is to ascertain, declare, and give effect to the intention of the legislature, as gathered from the language used. In the interpretation of remedial statutes, however, a special effort is made to avoid a technical construction of the language used, and to give it a fair construction so as to promote justice in the interest of the public good. The purpose of the act should be taken into consideration. The construction should be one which would be consistent with, and promote, preserve, and effect, the object of the statute, so as effectually to meet the beneficial end in view, and not one which would defeat the manifest purpose or design of the statute. * * *."

In Black's Law Dictionary, Deluxe Edition, at page 488, we find the following as to the meaning of the word "cumulative":

"Additional; * * * * * forming an aggregate. The word signifies that two things are to be added together, instead of one being a repetition or in substitution of the other. *People v. Superior Court*, 10 Wend. (N.Y.) 285; *Regina v. Eastern Archipelago Co.*, 18 Eng. Law & Eq. 183."

In Words and Phrases, Permanent Edition, Vol. 10, at pages 653-654, we find the following in regard to this term:

"The term 'cumulative,' as used in Tex. Acts 1899, p. 257, c. 146, § 14, providing that the provisions of the act shall be held to be 'cumulative' of all laws now in force in this state, indicates a harmonious coexistence and cooperation rather than a consolidation of two things into one. * * * * State v. Laredo Ice Co., 73 S. W. 951, 952, 96 Tex. 461."

* * * * *

"Where one thing is cumulative of another, whether it be remedy, penalty, or power, we are speaking commonly of two things which are at least consistent, and might, without incongruity, be applied at the same time.' * * * * Merchants' Coal Co. v. Fairmont Coal Co., 160 F. 769, 779, 88 C. C. A. 23."

Construing these statutory provisions (Title 12, Chapter 5, Sections 67-72), as remedial statutes should be construed, and giving the word "cumulative," as used in Section 72, supra, the meaning which must be accorded to it in the light of the above definitions, I conclude that they, in truth and in fact, provide "additional authority for the betterment of all county public road systems," just as Section 72, supra, states; and that they in no way affect the broad powers of county governing bodies in regard to public roads, bridges, and ferries of the county under Section 43, supra.

In other words, as I see it, Section 43, supra, and Chapter 5, Sections 67-72, supra, must be considered as two statutes added together, with a harmonious coexistence, which may, without incongruity, be applied at the same time.

So considered, I advise you specifically as follows:

1. A county governing body, pursuant to the authority vested in it by Title 23, Section 43, Code of Alabama 1940, may supplement the salary of its county engineer, employed or appointed pursuant to the provisions of Title 12, Chapter 5, Sections 67-72, Code of Alabama 1940, out of the funds of the county available for public road and bridge purposes, over and above the amount of \$4,000 per annum, to such an extent as it deems reasonable.

2. If a county, in the employment or appointment of a county engineer, complies with all of the provisions of Title 12, Chapter 5, Sections 67-72, Code of Alabama 1940, the State Highway Department may participate in the payment of his salary to the extent of one-half of \$4,000 per annum, the maximum amount fixed by said statutory provisions, notwithstanding the fact that the county governing body supplements his salary under Title 23, Section 43, Code of Alabama 1940.

I have reconsidered the opinion rendered by me to Hon. Ward W. McFarland, State Highway Director, under date of January 15, 1948, referred to in your letter of inquiry, dealing with the County Engineer of Montgomery County, in the light of the above holding, and have also examined the local act pursuant to which he is appointed (Act No. 76,

Local Acts 1939, page 39). I find nothing in said act which conflicts with any of the provisions of Title 12, Chapter 5, Sections 67-72, *supra*. Therefore, if the county governing body of Montgomery County, in the employment or appointment of its county engineer pursuant to said local act, complies with all of the provisions of Title 12, Chapter 5, Sections 67-72, *supra*, then the fact that his salary is fixed in excess of \$4,000, would not prevent the State Highway Director from authorizing the State Highway Department to participate in the payment of his salary to the extent of one-half of \$4,000 per annum. Accordingly, that opinion is hereby expressly overruled and withdrawn.

I have not considered any other local acts dealing with the employment or appointment of county engineers. The holding herein made in regard to the County Engineer of Montgomery County would not necessarily apply to other county engineers employed or appointed pursuant to local acts. Its applicability to any such county engineer would depend on the provisions of the local act pursuant to which he is appointed, and whether or not, in his employment or appointment, the county governing body complied with the provisions of Title 12, Chapter 5, Sections 67-72, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 10, 1948.

Honorable A. Beverly Jefferies,
Chairman, Board of Revenue and
Road Commissioners of Mobile County,
Mobile, Alabama.

Counties—Mobile County—Bonds—Roads and Bridges.

Road and Bridge Bonds issued by Mobile County in accordance with Constitution of Alabama 1901, Amendment 18, and subsequent enabling legislation, may be retired before maturity out of surplus monies in the special fund for the retirement of said bonds, provided such premature retirement would result in a savings to the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of March 5, 1948, is as follows:

“Your opinion is respectfully requested on the following important question, viz:

"May the governing body of Mobile County lawfully direct, and the Treasurer of Mobile County legally retire and pay, with surplus funds of the County's Special Five Mill tax levied under authority of Amendment 18 to the Constitution of Alabama of 1901 and Local Act No. 246 of 1927 as amended, Road and Bridge Bonds of Mobile County, Series 1947, sold on February 19, 1948, in accordance with the resolution of the county governing body adopted February 19, 1948, a true copy of which is attached hereto?

"For your information in answering this question, please be advised that under said Constitutional Amendment No. 18 and said local enabling act of 1927, and in the years 1928 and 1930, Mobile County issued a total of \$5,725,000 of such bonds, and to pay interest and principal thereof has levied and collected, annually, the maximum five mill tax authorized therefor. Over the years, a surplus somewhat in excess of \$500,000 has accumulated above debt service requirements and in order that the County might realize a return on such surplus, this Board last year authorized and directed the County Treasurer to invest \$500,000 of such surplus in U. S. government securities, which was done.

"Now on February 19, 1948, our County sold \$4,500,000 of similar Road and Bridge Bonds, Series 1947, and the purchaser thereof has indicated that it might be willing to surrender for retirement and cancellation five hundred of such bonds (each in the denomination of one thousand dollars) at face value plus accrued interest. The Board's resolution, copy of which is attached, indicates the County governing body is desirous of doing this with the surplus funds referred to, hence this request for your official opinion thereon.

"Pertinent laws relating to these road bonds are the following: Amendment 18 to the Constitution of 1901; Local Act 246 of 1927, p. 151-163; Local Act 160 of 1931, p. 51-4; Proposed Constitutional Amendment 9 voted favorably on November 5, 1946, see General Acts 1945, p. 681-3, and Local Act 349 of 1945, p. 167-171."

I am of the opinion that your inquiry should be answered in the affirmative, provided the procedure would result in a savings to the county.

The resolution attached to your letter of inquiry is as follows:

"STATE OF ALABAMA)
"COUNTY OF MOBILE)

"Be It Resolved, by the Board of Revenue and Road Commissioners that the County Treasurer is hereby authorized and directed to sell the \$500,000.00 of Government Securities recently purchased with funds of the Special Five Mill Road Tax and use such funds to purchase an equal amount of County Road and Bridge Bonds, Series

1947, if he can legally do so, and provided the holders of the bonds to such amount will agree to surrender same for payment.

"Adopted February 19, 1948.

"E. C. Doody

Administrative Assistant

Board of Revenue and Road Commissioners."

It clearly appears from a reading of the constitutional amendments and the statutory provisions cited in your letter, in conjunction with the facts stated, that although there were several series of the Road and Bridge Bonds in question issued, all of said bonds are retirable from only one special fund, viz., the proceeds of the authorized special five mill tax levy in question.

Any surplus in this special fund, over and above the amount necessary to meet the debt service requirements in retiring bonds outstanding against said fund, may, in my judgment, be used to retire a portion of the bonds outstanding against said fund before the maturity thereof, provided such premature retirement would result in a savings to the county.—Quarterly Report of Attorney General, Volume 11, page 98.

I assume the U. S. Government Bonds in which the surplus in question is invested are cashable at any time, and are, therefore, for all intents and purposes, equivalent to money.—*Taxpayers and Citizens v. Shelby County*, 246 Ala. 192, 20 So. 2d. 36. If the holders of a portion of the outstanding 1947 Series Bonds in question are willing to surrender same before maturity, it would be proper for the county to act in accordance with the resolution, provided the procedure would result in a savings to the county. This, in my opinion, would be a sound business practice.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 10, 1948.

Hon. W. H. Wilson.

Judge of Probate,

DeKalb County,

Fort Payne, Alabama.

Exemptions—Licenses—Municipal Corporations.

Title 51, Section 611; Title 37, Section 758 and Title 2, Section 481, Code of Alabama 1940.

1. Farmers exempt from payment of transient vendors' and peddlers' license under Title 51, Section 611, are not required to procure tax exemption certificate from Probate Judge.

2. Although municipal corporations are prohibited from charging farmers a license to sell products produced by them, reasonable proof of this fact may be required.

Opinion by Assistant Attorney General Miller.

Dear Sir:

Your request for an official opinion, bearing date of July 9, 1948, is as follows:

"Farmers who grow their own products are continually asking me for permits for the purpose of selling from house to house or to merchants. Some of them go into adjoining states to sell their products.

"Occasionally they go to our County Agent and gets permits. Some of our farmers have reported that they have been inconvenienced especially in Tennessee.

"Please give me your opinion as to which office in this County should issue these permits and the proper wording that will be acceptable in adjoining states."

The only provision I find in the law affecting farmers who sell their products in house to house selling are license tax exemption statutes. Since your inquiry does not specify the type of permit the farmers have requested of you, and the only provisions in the Alabama statutes affecting farmers who sell their products in house to house selling deal with tax exemptions, I assume that these farmers have contacted you with reference to license tax exemptions.

Title 51, Section 611, Code of Alabama 1940, levies a privilege license tax on transient vendors and peddlers. Subdivision (d) of this section provides, in part, as follows:

"* * * This section shall not apply to a person or to any member of his immediate household, selling or offering to sell dairy, poultry, or farm products raised, produced or grown by himself, or the immediate members of his household, or such products preserved, bottled, or canned by himself, or the immediate members of his household, * * *"

The above-quoted portion of the statute which levies a privilege license tax on transient vendors and peddlers expressly provides that it shall not apply to a person or any member of his immediate household selling farm products produced by himself, or the immediate members of his household. It is, therefore, not necessary for farmers who grow their own products to procure from your office a permit or tax exemption certificate in order to be exempt from paying the privilege license tax levied by Title 51, Section 611, Code of Alabama 1940.

Title 37, Section 758, Code of Alabama 1940, prohibits municipalities from charging farmers, or others, engaged in the production of farm products, a license or fee for the sale of farm products produced by them. This section is as follows:

"§ 758. No license for farm products charged to farmers.—It shall be unlawful for any municipality to charge the farmers or others engaged in the production of farm products of whatever nature, any license or fee, for the sale or other disposition of said articles produced by them, at any place."

This same prohibition is found in Title 2, Section 481, Code of Alabama 1940. This section states:

"§ 481. Sale of farm produce by the producer.—It shall be unlawful for any municipality to charge the farmer or others engaged in the production of farm products of whatever nature, any license fee for the sale or other disposition of such farm products produced by them at any place; nor shall such municipality prevent the sale of such products by the producer thereof when the said farmer shall have complied with all reasonable regulations for the sale of such products in such municipality."

From the two foregoing quoted sections, it can be seen that municipalities in Alabama cannot charge farmers who produce their own products a license to sell such products.

I am advised that many municipalities in the State require farmers who wish to sell their products within these municipalities to furnish evidence of the fact that the products to be sold have been grown by them. Most of these municipalities follow the practice of accepting a written statement or certificate from the County Farm Agent to the effect that the farm products to be offered for sale were grown by the farmer who offers such products for sale. This administrative practice followed by these municipalities appears to be a reasonable requirement, and if the municipalities in your County follow this procedure, a farmer should furnish the municipal authorities with a written statement from the County Farm Agent certifying that he produced the products that he desires to sell.

With reference to that portion of your inquiry requesting information as to what will be acceptable in adjoining states before a farmer can sell his products, I wish to advise that this is to be determined by the state in which the farmer proposes to sell his farm products. It is a well established principle of law that the laws of a state have no extra-territorial effect. In other words, Alabama statutes, rules, regulations and administrative procedure have no effect beyond the territorial limits of the State. Therefore, a farmer who resides in Alabama and desires

to sell his products in an adjoining state, must comply with the laws of that state.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 11, 1948.

Hon. Henry Jones,
Sheriff, Jackson County,
Scottsboro, Alabama.

Jackson County—Inferior Courts—Justices of the Peace—
Criminal Law—Statutes.

1. The Jackson County Court established by Act No. 647, Local Acts 1939, page 368, creates an inferior county court having all of the jurisdiction and authority of a county court.

2. Title 13, Section 327, Code of Alabama 1940, authorizes justices of the peace to issue warrants of arrest for misdemeanors returnable to the county court.

3. Title 13, Section 327, Code of Alabama 1940, authorizes justices of the peace in Jackson County to issue warrants of arrest returnable to the Jackson County Court, which was created in lieu of a county court.

4. The fact that a local act creating an inferior court makes it a duty of the clerk of said court to record affidavits returnable to said court from a justice of the peace court indicates a legislative intent that justices of the peace in said county are authorized to make affidavits and warrants of arrest returnable to said inferior court.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 27, 1948, is as follows:

"I request your opinion on the following question: The Jackson County Court, a court of statutory creation with jurisdiction over misdemeanors was created by the 1939 session of the Alabama legislature (Local Acts 1939, page 369).

"Section 379 of said act provides that misdemeanor cases may be commenced in said court by the issuance of an affidavit and warrant of arrest by either the judge of the court or the clerk thereof. In the past, we have been executing affidavits and warrants of arrest

sworn out before Justices of the Peace which warrants were made returnable to the Jackson County Court. These warrants are executed by the Justice of the Peace on matters of which the County Court has original jurisdiction and do not reach the court as appeal cases.

"In view of the above cited section, I would like to know whether a Justice of the Peace can lawfully issue a warrant of arrest returnable to the Jackson County Court for original trial."

It is my opinion that a justice of the peace of Jackson County may lawfully issue a warrant of arrest returnable to the Jackson County Court for original trial.

The local act establishing the Jackson County Court is Act No. 647, Local Acts 1939, page 368. Section 22 of said local act (to which you refer in your inquiry as Section 379) provides as follows:

"Prosecutions for misdemeanors committed in Jackson County may be instituted in this court by making an affidavit before the judge of said court or the clerk thereof, the writ of said affidavit to be issued by the clerk of said court, and when the defendant is arrested on said affidavit, said case shall go on the docket for trial, and be tried as though the defendant had been indicted by a grand jury, provided, however, that the affidavit or complaint may be amended as now provided by amendment of such papers by Section 3825 of the Code of Alabama."

In an opinion rendered by the Attorney General on March 28, 1941, appearing in Quarterly Report of the Attorney General, Vol. 22, page 250, in connection with Local Act No. 647, *supra*, it was stated:

"From a reading of Act No. 647, *supra*, in its entirety, there can be no doubt that the court created thereby had conferred upon it exclusive jurisdiction of all cases theretofore triable in the County Court of Jackson County, Alabama, . . ."

Although Act No. 647, *supra*, does not expressly provide that the Jackson County Court has all of the jurisdiction and powers of a county court, we agree with the conclusions reached in the opinion above referred to, that is, that the Jackson County Court has exclusive jurisdiction of all cases triable before the County Court of Jackson County. It is significant to note that Section 9 of Act No. 647, *supra*, required that all misdemeanor cases in the Circuit Court of Jackson County be transferred to the Jackson County Court, and all indictments for misdemeanors are required to be transferred to the Jackson County Court.

It is further found in Section 27 of Act No. 647, *supra*, that, "It shall be the duty of the clerk of said court to keep a record upon which shall be recorded all affidavits made before the judge of said court, or returnable by a justice of the peace, or judge of an inferior court in said

county, to said court, . . ." Further, Section 38 of said local act abolishes the County Court of Jackson County, and all cases pending on the docket of the County Court of Jackson County are required by said Section 38 to be docketed in the Jackson County Court.

The conclusion is inescapable, therefore, that the Jackson County Court created by Act No. 647, supra, is in lieu of a county court or misdemeanor court, and possesses all of the jurisdiction and authority of a county court.

Our statutes expressly provide that a justice of the peace may issue a warrant returnable to a county court. Title 13, Section 327, Code of Alabama 1940. *Ahlrichs v. Rollo*, 200 Ala. 271, 76 So. 37.

It is my opinion, therefore, that Title 13, Section 327, Code of Alabama 1940, authorizing justices of the peace to make warrants returnable to the county court, authorizes said justices of the peace to make warrants returnable to a court created in lieu of a county court and having all the authority and jurisdiction of said county court. Quarterly Report of Attorney General, Vol. 49, page 97.

This conclusion is strengthened by the fact that Section 27 of Act No. 647, supra, requires the clerk of the Jackson County Court to record affidavits made returnable to the Jackson County Court by a justice of the peace. Such a provision of law indicates to me that the Legislature intended that justices of the peace in Jackson County have authority to make their warrants of arrest based on said affidavits returnable to the Jackson County Court for original trial.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 12, 1948.

Hon. H. W. Clayton,
Judge of Probate,
Marshall County,
Guntersville, Alabama.

Judges of Probate—Records—Real Estate—Mortgages—Deeds.

It is the duty of the judge of probate to register deeds of conveyance and mortgages of real estate in separate books, his wilful omission or refusal in this respect subjecting him to fine and removal from office. Title 13, Sections 280-281, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of August 7, 1948, is as follows:

"It has been the practice and custom of the Probate Office in this County to record the Deeds in one Book and Mortgages of Real Estate in a separate one alternately; and sometimes the Deed Books were given even numbers and the Mortgage Books odd numbers, and later vice versa and then sometimes two or more mortgage books or two or more deed books, and all numbered consecutively irrespective of whether the books were mortgages or deeds, and all indexed in one general land index, direct and reverse, the index, however, showing whether the instruments were deeds of conveyance or mortgages. The real estate deeds and mortgages, however, have been kept separate from Chattel Mortgages or Bills of Sale. Why this plan was adopted, I do not know.

"Now we are recording all our real estate instruments, both deeds and mortgages by a Photostat Machine, and we find from experience that it would simplify our work and be more economical in binders, if we could record all deeds and mortgages consecutively as filed and put them in the same binders and index them in the same General Real Estate Index showing the respective instruments as deeds or mortgages as the case may be. Now all instruments are examined for mortgage taxes and recording privilege taxes by the State Examiners.

"I want to know if there is any legal reason to require me to keep recording deeds of conveyance and mortgages of real estate in separate books as heretofore the custom in this County."

In defining the duties of the judge of probate, Title 13, Section 280, Subdivision 11, Code of Alabama 1940, provides that it is his duty:

"11. To keep large and well-bound books for the registration of deeds of conveyance, and other and separate books of like character for the registration of mortgages and other instruments to secure the payment of debts."

Your further attention is invited to Title 13, Section 281, Code of Alabama 1940, which section provides a penalty for a judge of probate who knowingly omits or refuses to perform a duty required of him by law.

In my judgment, the above statutory provisions constitute ample and sufficient legal reason for your continuing to record deeds of conveyance and mortgages of real estate in separate books. Therefore, your question is answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 12, 1948.

Honorable C. A. Motley,
Councilman, Town of Autaugaville,
Autauga County,
Autaugaville, Alabama.

Municipality—Appropriations—Contributions.

Town of Autaugaville may legally contribute municipal funds to public school within the town for the purpose of constructing and equipping a modern athletic field on the school ground.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of March 22, 1948, is as follows:

"The school and community are trying to build a Field and lighting it in the town of Autaugaville for playing Baseball and Football and other sports for the school and community and is being built on school property.

"I as a member of the town council of Autaugaville, Alabama am taking the liberty to ask you if the town of Autaugaville would be permitted to contribute any funds to this project, we do want to help some if it would be legal."

In answering your question, it is my opinion that the Town of Autaugaville may legally contribute municipal funds to a public school within the town for the purpose of constructing and equipping a modern athletic field on the school ground.

The Supreme Court of Alabama, in the case of *Fitts v. the Commission of the City of Birmingham, et al.*, 224 Ala. 600, 141 So. 354, held that the City of Birmingham had the necessary implied power to protect and promote its well-being before the Legislature and to incur and pay reasonable compensation therefor. In this case, the Court followed the broad view as to the inherent power of municipalities to expend money in the interest and welfare of its citizens.

Our Supreme Court has held that municipalities may contribute funds to the county to aid in building a school building in the city, although the county retained title to the building. See *The First National Bank of Birmingham v. Walker County Board of Education, et al*, 243 Ala. 576, 11 So. 2d. 297; *Carey v. The City of Haleyville*, 230 Ala. 401, 161 So. 496.

Title 52, Section 555, Code of Alabama 1940, provides as follows:

"§ 555. Physical education required.—Every public school and private or parochial school shall carry out a system of physical

education, the character of which shall conform to the program or course outlined by the department of education."

From the above, it is obvious that a system of physical education in our schools is mandatory, and it is much easier for the school authorities to provide a proper system of physical education when they have the benefit of modern athletic facilities.

It therefore follows that the Town of Autaugaville has authority to contribute funds to a public school within the town for the betterment of the school facilities by the addition of a modern athletic field.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 12, 1948.

Hon. Jeff D. Smith,
Solicitor,
Twenty-third Judicial Circuit,
Madison County,
Huntsville, Alabama.

Motor Vehicles—Licenses.

Title 36, Sections 1, 3, 59, 64, and 67, Code of Alabama 1940.

1. A person operating any self-propelled motor bike upon the public highways of the State must first secure a driver's license authorizing such operation.

2. A person operating such a motor bike upon the public highways of the State of Alabama in a manner declared unlawful by Title 36, Section 3, Code of Alabama 1940, may be charged with the offense of reckless driving.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of July 2, 1948, is as follows:

"Recently our Highway Patrolmen filed an affidavit in the Inferior Court charging a boy, approximately nineteen years of age, with driving a motor bike without first obtaining a driver's license. This motor bike is nothing more than a bicycle with a motor attached. They are commonly known as 'whizzers.'

"An official opinion is requested as to the following, viz:

"1. Is it mandatory for a person propelling a bike of this type on a public highway to obtain a driver's license under the Alabama law?

"2. Can a person be found guilty of reckless driving a motor bike of this type under the present reckless driving law of Alabama?

"Your usual prompt attention will be appreciated."

In my opinion, each of your inquiries must be answered in the affirmative.

With reference to your first inquiry concerning the duty of one operating a motor vehicle, such as that described in your inquiry, upon the public highways of the State to first secure a driver's license, it is provided by Title 36, Section 59, Code of Alabama 1940, that:

"Every person, except those hereinbelow exempted, before driving any motor vehicle upon a public highway in this state, shall procure a driver's license. * * * * *"

The exemptions above referred to are found set out in Title 36, Section 67, Code of Alabama 1940, and such statute affords no exemption from licenses to operators of vehicles of the type described by you in your request.

Title 36, Section 1, Code of Alabama 1940, specifically defines the terms "vehicle" and "motor vehicle" as used within such Title, such definitions being as follows:

"'Vehicle.' Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks; provided, that for the purposes of this title, a bicycle or a ridden animal shall be deemed a vehicle.

"'Motor Vehicle.' Every vehicle, as herein defined, which is self-propelled."

In your request, you state that the type vehicle to which you refer is a bicycle with a motor attached. It is to be noted that the above provision of law defining a "vehicle" specifically states that a bicycle shall be deemed a vehicle, it being further stated within the provisions defining a "motor vehicle" that every vehicle which is self-propelled shall be deemed a motor vehicle.

In view of the above, it is my opinion that the type vehicle described by you in your request is a "motor vehicle" within the meaning of the provisions of Title 36, Section 1, supra, and such being true, it is

mandatory that any person operating such a vehicle upon the public highways of the State must first secure a driver's license authorizing such operation.

In support of the above conclusion is the fact that Title 36, Section 64, Code of Alabama 1940, in making provision for the issuance of temporary instruction permits, specifically exempts operators of motorcycles holding such permits from the requirement that such operator be accompanied by a licensed driver who is actually occupying a seat beside the driver. This, in my judgment, is further evidence of the fact that it was the unmistakable intent of the legislature that operators of the vehicle described by you comply with the provisions of law relative to the securing of a driver's license. In this connection, it should be pointed out that it has been held by a former opinion of this office that an operator of a vehicle such as that described by you must secure a motorcycle license tag for such vehicle. Quarterly Report of Attorney General, Vol. 29, page 63.

With regard to your second inquiry as to whether an operator of such a vehicle may lawfully be charged with the offense of reckless driving, I refer you to the provisions of Title 36, Section 3, Code of Alabama 1940, which statute provides that:

"Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving * * * * *"

Inasmuch as the provisions of such statute are applicable to the driver of any "vehicle," and it having been above noted that a machine such as that described by you falls within the definition of both a "vehicle" and a "motor vehicle," it is my opinion that the operator of such may lawfully be charged with the offense of reckless driving if such vehicle be operated upon the public highways of the State in a manner declared unlawful by statute.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 13, 1948.

Hon. Lecil Gray,
Judge of Probate,
Walker County,
Jasper, Alabama.

Filing Tax—Deed Tax—Mortgages—Assignment.

Recording of assignment of a mortgage, upon which mortgage no tax has been paid because it was recorded by a Federal

instrumentality, is subject to the deed tax under Title 51, Section 618, Code of Alabama 1940.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of July 23, 1948, is as follows:

"On the 9 day of July, 1947, Mr. L. M. Muldrow, President of Northside Homes, Inc., on behalf of the First National Bank of Birmingham, Alabama, filed a mortgage in this office to secure a debt of Northside Homes, Inc. in the amount of \$50,700. This mortgage is recorded in Book 512, page 498, and was not subject to the filing tax for mortgages as provided by Title 51, Section 619, 1940 Code of Alabama, as the mortgagee was the First National Bank of Birmingham.

"Mr. L. M. Muldrow, President of Northside Homes, Inc., acting on the request of the First National Bank of Birmingham, has presented to me an assignment of this mortgage from the First National Bank of Birmingham to the Wachovia Bank & Trust Company, a North Carolina corporation, the consideration for the assignment being \$50,467.69. There remains unpaid of the original mortgage the amount of \$50,381.26.

"This office has held that this instrument is subject to mortgage tax of \$75.75, in accordance with Title 51, Section 619, 1940 Code. Mr. Muldrow takes the position that this instrument is being presented by the First National Bank of Birmingham, an Alabama banking institution, for recording and therefore is not subject to the mortgage filing tax. This office takes the position that this instrument is being presented by the Wachovia Bank & Trust Company, a North Carolina Banking corporation, and is therefore liable for payment of the mortgage filing tax.

"I have talked by telephone with Mr. Paul T. Huck of the First National Bank of Birmingham and he states that he has an agreement with Mr. L. M. Muldrow, President of Northside Homes, Inc., that he was to pay all costs incident to the recording of the assignment of this mortgage in event they sold the same, and that Mr. L. M. Muldrow, President, is liable for the payment of this tax.

"Please give me your opinion of the following questions:

"1. Is this instrument subject to the mortgage filing tax as provided in Title 51, Sec. 619, 1940 Code of Alabama?

"2. Is the instrument subject to mortgage tax on the unpaid balance of the original mortgage of \$50,381.26 and deed tax on

\$86.43, the difference in the unpaid balance of the mortgage and the consideration of the assignment?

"3. Is this assignment subject to deed tax on the amount of \$50,467.69, due to the fact that it conveys all of the interest of the First National Bank in said mortgage to the Wachovia Bank & Trust Company?"

In my opinion the answers to the questions propounded by you are as follows:

1. No.
2. No.
3. Yes, with qualifications.

This office has previously ruled that the assignment of a mortgage upon real property is subject to the filing tax for deeds when presented for recordation in the event that the mortgage tax has not been paid upon the recordation of such mortgage. Biennial Report of Attorney General, 1930-32, page 803.

In the cited opinion it appears from the facts that the Federal Land Bank of New Orleans transferred a mortgage to "A," who presented such assignment to the judge of probate for record. The judge of probate requested an opinion as to whether the license tax should be required before accepting such instrument for record.

This office reviewed the history of the recording statutes and ruled that the assignment of a mortgage came within the section applicable to deeds, as noted in such opinion, if the mortgage tax had not been paid upon the recordation of such mortgage. The Legislature in 1927 had amended the deed record statute by inserting the clause "except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid." It was ruled that this amendment brought within the scope of the statute the assignment of mortgages if the mortgage tax had not been paid upon the recordation of the mortgage.

The opinion sets forth the rule of statutory construction governing such matter as follows: "The exception of a particular thing from the operation of the general words of a statute shows that, in the opinion of the lawmakers, the thing excepted would be within the general words had not the exception been made."

It is to be noted, of course, that the Federal Land Bank paid no filing fee when it recorded the mortgage since it is exempt as a federal instrumentality. The filing tax on deeds, Title 51, Section 618, Code of Alabama 1940, is the same as the 1927 Acts, as noted in the above cited opinion insofar as it is relevant to this matter.

In a later opinion, Biennial Report of Attorney General, 1936-38, page 729, it was ruled that under facts which were the same as in the previously cited opinion it is immaterial whether the federal instrumentality or its assignee offers the assignment of the mortgage for record because it is nevertheless taxable. It was ruled in such opinion that since the assignment inures to the benefit of the assignee, who is not exempt, the tax is due regardless of whether the assignor or assignee offers such assignment for record.

Therefore, it is my opinion that the recordation of the assignment of the mortgage by the First National Bank of Birmingham to the Wachovia Bank & Trust Company is subject to the filing tax under Title 51, Section 618, Code of Alabama 1940, regardless of whether it is offered for record by the First National Bank or the Wachovia Bank and Trust Company.

In your inquiry numbered three, you have asked whether the deed tax is due on the amount of \$50,467.69. This amount is the consideration of the assignment of such mortgage. However, the tax under said Section 618 is based upon the "value of property conveyed by such instrument." It appears that probably the value of the property conveyed is the sum of \$50,467.69, since it is the consideration of such conveyance; but this is not necessarily true. The consideration of a bona fide conveyance made "at arms length" is an indication of the value of the property conveyed, but the fact remains that you must determine from all the evidence available the value of the property conveyed. It is for this reason that I have answered your third inquiry with qualifications.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 12, 1948.

Hon. S. Fleetwood Carnley,
Director of Industrial Relations,
State of Alabama,
CAPITOL.

Department of Industrial Relations—Board of Appeals.

1. Members of the Board of Appeals of the Department of Industrial Relations should be reimbursed for their actual travelling expenses incurred in carrying out their duties as provided by Title 26, Section 8, Code of Alabama 1940, as amended by Act No. 410, General Acts 1943, page 375, approved July 7, 1943.

2. The \$25 per diem paid to the Board members should be placed on a pay roll, and is payable from the Unemployment Compensation Fund under Title 26, Section 248, Code of Alabama 1940, as amended by Act No. 310, General Acts 1943, page 281, approved June 28, 1943.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of August 2, 1948, is as follows:

"Your opinion is requested with respect to the travel allowance provided by law for the members of the Board of Appeals of the Department of Industrial Relations.

"Expressly, the question involved is:

"Under the provisions of Section 8, Title 26, 1940 Code as amended by the 1943 Acts at page 375, are the actual travel expense allowances of the members of the Board restricted to the amount limited by Section 154 of Title 41, 1940 Code as amended by Acts of 1943 at page 195?

"A subsidiary question arises:

"Should the \$25 per diem payment to the Board members be claimed by them upon a travel expense voucher or should it be placed upon a supplemental pay roll so as to be charged to the cost of personal services payable from the Unemployment Compensation Administrative Fund under Section 248, Title 26?

"It appears to me that the provisions of the 1943 Act amending Section 8 of Title 26 construed in the light of the superseded language of the original section expressly negates the applicability to the Board members of Section 154 of Title 41 as amended, and that even though the Department of Industrial Relations were to adopt a regulation making the allowance in accordance with that specified in Section 154 that this amount would not operate as a limitation upon the Board of Appeals since it appears to be an agency not under the complete control of the Director of Industrial Relations.

"Your prompt attention to this question will be very much appreciated inasmuch as the Social Security Administration is attempting to take the position that actual travel expenses beyond \$5 per day (which is the established lawful limit for employees of this Department) for Board members are improper disbursements from the Unemployment Compensation Administrative Fund. This Department, of course, feels that the Social Security Administration's interpretation is contrary both to State law and to the Federal statute authorizing grants to this State for the administration of the Unemployment Compensation Law."

In my opinion, your first question should be answered in the negative. The members of the Board of Appeals of the Department of Industrial Relations should be reimbursed for their actual travel expenses

incurred in carrying out their duties. Title 26, Section 8, Code of Alabama 1940, as amended by Act No. 410, General Acts 1943, page 375, approved July 7, 1943, provides, in part, as follows:

"Section 1. * * * * * Members of the Board of Appeals shall receive no salary but shall be paid for each day or part thereof necessarily spent in the discharge of their official duties an amount to be agreed upon by the Director of Industrial Relations and the Governor, the same not to exceed twenty five dollars; the sum total to be paid to any one member, however, shall not exceed \$750 in any one calendar year; plus actual travel expense allowances. * * *

"Section 2. That all laws and parts of laws, general or special in conflict herewith are hereby repealed.

"Section 3. This act shall become effective upon passage and approval by the Governor.

"Approved July 7, 1943."

The act, supra, is the last enactment of the Legislature on this subject and also is a special enactment which controls over the general enactment under Title 41, Section 154, Code of Alabama 1940, as amended by Act No. 238, General Acts 1943, page 195, approved June 22, 1943. See cases in 18 Ala. Digest, Statutes, Key No. 225½.

In answering your subsidiary question, it is my opinion that the \$25 per diem, paid to the Board members, should be placed on the pay roll, and is payable from the Unemployment Compensation Fund under Title 26, Section 248, Code of Alabama 1940, as amended by Act No. 310, General Acts 1943, page 281, approved June 28, 1943. Section 14 of said act provides, in part, as follows:

"A. There shall be in the treasury a special fund to be known as the unemployment compensation administration fund. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the director. All moneys in this fund shall be expended solely for the purpose of defraying the cost of the administration of this chapter and for no other purpose whatsoever.
* * * * *

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 13, 1948.

Hon. Herman K. Longshore,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Mortgages—Deeds—Filing Tax.

A deed reciting that part of the purchase money is unpaid is treated as a mortgage as to unpaid balance insofar as mortgage tax levied by Title 51, Section 619, Code of Alabama 1940, is concerned.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 21, 1948, is as follows:

"I am enclosing a copy of a deed that has been filed in my office for record.

"Please advise whether or not the balance of purchase price mentioned in the deed would be subject to a mortgage tax."

The deed enclosed with your inquiry contains the following recital:

"That the parties of the first part, for and in consideration of the sum of Five Thousand (\$5,000.00) DOLLARS, cash in hand paid by the parties of the second part, receipt whereof is hereby acknowledged, and the further consideration of the sum of Fourteen Thousand (\$14,000.00) DOLLARS, evidenced by the second parties promisory note bearing even date herewith and payable on or before August 1st., 1948, without interest, First parties do by these presents, grant, bargain, sell, and convey," etc.

This is the only reference in the deed to an unpaid portion of the purchase price. Your inquiry is specifically answered by Title 51, Section 619, Subsection (c), Code of Alabama 1940, which provides as follows:

"(c) That when any deed is filed for record which recites that part of the purchase money is unpaid, such deed to the extent of such unpaid balance shall be held and treated as a mortgage, and the mortgage tax shall be collected by the judge of probate in addition to the tax for recording the instrument as a deed before recording the same, unless said balance of purchase money shall be secured by mortgage or deed of trust which has already been filed for record, and the tax thereon paid, and the fact of such prior payment shall be endorsed on the deed. When any such deed is recorded and the

tax thereon is paid, and thereafter a mortgage securing the debt is filed for record, the same shall be admitted to record without the payment of the mortgage tax and the fact of such prior payment shall be endorsed on the deed."

You are advised, therefore, that the mortgage tax should be collected on the unpaid balance in accordance with Subsection (c), supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 16, 1948.

Hon. Charles W. Terry,
Director,
Personnel Department,
State of Alabama,
CAPITOL.

State Personnel Board—Merit System—Veterans.

Title 55, Sections 300 and 305, Code of Alabama 1940.

1. Applicants for entry into the classified service of the State, entitled by law to preference points upon examination, should have such preference points added to the grade actually attained upon such examination, whether such grade be above or below the minimum grade required by the State Personnel Board for entry upon the roster of qualified applicants.

2. The State Personnel Board is without authority to promulgate a rule or regulation prescribing that applicants, to become entitled to the preference points allowed them by law, must attain any specific grade upon examination, as such rule or regulation is in conflict with the laws of the State.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion is as follows:

"Your attention is called to that part of Title 55, Sec. 305, of the Alabama Code of 1940 that provides as follows: 'All persons who have been honorably discharged from the army, navy, or marine corps, who served in armed forces of United States during the period of a war, shall have five points added to their earned ratings in examination for entrance to the classified service; provided, however, that such person be a qualified voter in Alabama or has been a

resident of this state for two years next preceding his or her application; all persons who served in the armed forces of the United States during the period of a war who have been honorably discharged and who establish by official records of the United States the present existence of a service connected disability, and because of disability are entitled to pension compensation; or disability allowance under existing laws; and widows of such honorably discharged soldiers, sailors, and marines; and wives of such honorably discharged soldiers, sailors, and marines, who because of service connected disability are not themselves qualified but whose wives are qualified, shall have ten points added to their earned ratings.' Your attention is also called to Sec. 300 which determines how the Rules of the Personnel Department shall be adopted and states that: 'Rules adopted under this section, not in conflict with the laws of Alabama, shall have the force and effect of law.'

"The current Rules, adopted by the State Personnel Board and approved by Governor Chauncey Sparks in October, 1943, contains the following provisions: (Rule VII, Sec. 9) 'All persons honorably discharged from the Army, Navy or Marine Corps after serving in the armed forces of the United States during a period of war shall have 5 points added to any passing earned rating they achieve in an examination for entrance to the classified service.' (Rule I, Sec. 14) "'Earned Rating" means passing grade on an examination.'

"The State Personnel Board has requested that I obtain your official opinion as to whether the above rules are the law of the State under the provisions of Title 55, Section 300 of the Alabama Code of 1940, or whether a veteran who fails to make a passing grade on an examination should also receive the additional credit points and have his name placed on the list of eligibles if his grade plus the points gives him a grade of 70% or more."

In your request for opinion, you advise me that, pursuant to the powers invested in it by Title 55, Section 300, Code of Alabama 1940, the State Personnel Board has promulgated and adopted certain rules and regulations pertaining to the administration of the State Merit System. I notice from copy of such Rules of the State Personnel Board, now in hand, that such rules and regulations have subsequently been approved by Governor James E. Folsom, in December 1947.

Among the rules so adopted, and subsequently approved, are the following:

"Rule I, Sec. 14. 'Earned rating' means passing grade on an examination.

"Rule VII, Sec. 9. Veteran, Wife of a Veteran and Widow of a Veteran: All persons honorably discharged from the Army, Navy or Marine Corps after serving in the armed forces of the United States during a period of war shall have 5 points added to any

passing earned rating they achieve in an examination for entrance to the classified service. Persons who have established veteran's status as defined above and who, in addition, establish by official records of the United States the present existence of a service connected disability and because of disability are entitled to pension compensation or disability allowance under existing laws, and widows of such persons and qualified wives of such persons who are themselves not qualified because of service connected disability shall have 10 points added to any passing earned rating they achieve in an examination for entrance to the classified service. Provided, however, that any person to receive such additional credit must be a qualified voter in Alabama or must have been a resident of this state for two years next preceding his or her application." (Emphasis supplied).

In your request, you properly set out that portion of Title 55, Section 300, *supra*, which provides that: "Rules adopted under this section, not in conflict with the laws of Alabama, shall have the force and effect of law." Referring to this provision, you inquire as to whether the two specific rules quoted above may properly be adopted by the State Personnel Board, or whether such rules are in conflict with the law of Alabama.

Answer to your inquiry turns upon a proper interpretation and construction of the provisions of Title 55, Section 305, Code of Alabama 1940, which statute provides for the examination of applicants for entrance into the classified service of the State, and for the establishment of rosters of eligible applicants based upon the grade attained upon such examination. Such statute likewise contains a provision of law granting preference points upon such examination to certain veterans and their wives or widows. The portion of such statute pertinent to your inquiry is here set out:

"§ 305. Tests.— * * * *. All persons who have been honorably discharged from the army, navy, or marine corps, who served in armed forces of United States during the period of a war, shall have five points added to their earned ratings in examination for entrance to the classified service; provided, however, that such person be a qualified voter in Alabama or has been a resident of this state for two years next preceding his or her application; all persons who served in armed forces of the United States during the period of a war who have been honorably discharged and who establish by official records of the United States the present existence of a service connected disability, and because of disability are entitled to pension compensation; or disability allowance under existing laws; and widows of such honorably discharged soldiers, sailors, and marines; who because of service connected disability are not themselves qualified but whose wives are qualified, shall have ten points added to their earned ratings. In entering upon registers the names of preference claimants entitled to five points additional, they will take the place to which their ratings entitle them on the register with non-veterans—that is, the earned ratings augmented by the five points to which they

are entitled, and will be certified when their ratings are reached.
* * * ." (Emphasis supplied).

As pointed out by Professor Field in his text on Civil Service Law, upon page 118 thereof:

"Veterans' preference arises wholly from statute or express constitutional provision. There is no such preference in the absence of express command to give it and no such preference at common law. It is important in each instance to study the exact phraseology of the statute granting the preference, because there is no uniformity either as to the classes of veterans accorded the preference or as to the positions or offices to which it attaches. There is not even a general principle as to where in the process of selection the preference shall come into play. It may be a preference in examination, in position on the eligible list, in certification, in appointment, in promotion, in transfer, in layoff, in reduction of force, or in suspension and removal."

In accordance with the above, a study of the exact phraseology of Section 305, supra, discloses that the system of veterans' preference established by law for this State is preference upon examination. This is accomplished by adding to the actual grade attained upon examination the preference points prescribed by law. All applicants then take their respective places upon the eligible roster in accordance with the results of such examination. The only preference in the matter of certification from such roster is in the case of applicants having the same rating, in which case disabled veterans, or their wives or widows, shall be certified first; veterans, other than disabled veterans, shall be next certified, and non-veterans having the same rating will be last certified.

Construing this statute as a whole, it is obvious that the system of preference is substantially, and almost in its entirety, a system of examination preference, based upon the augmentation of the grade attained by the preferred applicants upon examination by adding thereto the preference points prescribed by law. Having attained their respective places on the eligible roster, all applicants stand alike, with the single exception of applicants having the same rating, as above noted, and the applicant having the higher rating, be he veteran or non-veteran, must be certified first.

Nowhere within such statute do I find any provision providing, or which might be construed as providing, that to entitle an applicant to the preference points granted him by law, such applicant must attain any specific grade on the examination. Rather, it is my opinion, that the language of such statute is a specific mandate that the preference points prescribed by law be added to the rating attained by an applicant entitled thereto, whatever such rating be.

It is further specifically provided by such statute that in entering the names upon the eligible roster, the names of those applicants entitled

to preference points will be entered in the order to which they are entitled by virtue of their augmented rating, that is, the total grade achieved after the addition of the preference points allowed by law. This, to me, can only mean that all positions upon the eligible roster are to be determined by final grade attained upon examination, and that in the event an applicant entitled to preference points upon examination, after final compilation of grade attained, including the addition of the preference points prescribed by law, has achieved the grade required by the State Personnel Board as a minimum for placing the name of any applicant upon the eligible roster, the name of such applicant should be entered.

In my opinion, the term "earned rating" bears no relation to a passing or failing grade upon examination but is, in fact, the actual grade attained by an applicant upon such examination, be it above or below the minimum grade required by the Board for entry upon the eligible roster.

The conclusion above announced finds support in the procedure and practice followed by the Civil Service Commission of the United States Government. Such Government has a system of veterans' preference in many respects similar to that of the State of Alabama. The system of veterans' preference upon examination is found within Title 5, U.S.C.A., Section 852, and in pertinent part, is as follows:

"In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 851 (1), (2), and (3) of this title, and five points shall be added to the earned ratings of those persons included under section 851 (4) of this title;
* * * *"

I am advised by a representative of the Civil Service Commission of the United States Government that in applying the above-quoted statute to applicants for entry into the Federal Civil Service, no regard is had as to the grade actually attained by such applicant upon examination, but rather that such preference points are added to the actual grade attained, whether it be above or below the minimum required for entry into the service.

I am, therefore, of the opinion that the State Personnel Board may not lawfully adopt the two rules set out by you in your inquiry, inasmuch as such rules conflict with the law of this State, and hence are not subject to adoption by the Board. Such rules purport to write into the statutes governing the administration of the Merit System Act a provision or requirement which cannot there be found, and to do so, in my opinion, would constitute an usurpation of the power of the Legislature.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 17, 1948.

Hon. P. S. Owen, Superintendent,
Board of Education,
Chambers County,
LaFayette, Alabama.

Statutes—Statutory Construction—Title 23, Section 140, Code of Alabama 1940—Act No. 65, General Acts 1932, Extra Session, page 86.

County Board of Education of Chambers County cannot officially name the gymnasium in the City of LaFayette after a person now living by virtue of Title 23, Section 140, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 10, 1948, is as follows:

“We request your official opinion on whether or not the gymnasium in the City of LaFayette can be named after a person living, in view of Title 23, Paragraph 140, of the Code of Alabama.

“Several months ago before the building was erected I received a letter from the Chairman of the LaFayette School Board, requesting that this building be named after a man now living. Furthermore, several organizations have unanimously passed resolutions before the construction of the building, asking that same be named after this particular living person.

“The County Board of Education desires to officially name the gymnasium after this person if they can lawfully do so.”

Title 23, Section 140, Code of Alabama 1940, to which you refer, is published in the Code as follows:

“It shall be unlawful to name, call or designate any building, bridge, or other structure or any institution, constructed, erected, maintained or financed, in whole or in part, by the State of Alabama, after any person then living; provided the provisions of this section shall not apply to buildings, bridges, or other structures or institutions not existing.” (Emphasis supplied.)

However, if you will review the act from which this section of the code was drafted (Act No. 65, General Acts 1932, Extra Session, page 86), you will find the following set forth in entirety:

"No. 65)

(H. 98—Yerby

AN ACT

"To declare it unlawful to name, call or designate any building, bridge, or other structure or any institution, constructed, erected, maintained or financed, in whole or in part, by the State of Alabama after any person whomsoever then living; provided the Act shall not apply to buildings, bridges, or other structures or institutions now existing.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section One: That it shall be unlawful to name, call or designate any building, bridge, or other structure or any institution, constructed, erected, maintained or financed in whole or in part, by the State of Alabama after any person then living; provided the provisions of this Act shall not apply to buildings, bridges, or other structures or institutions now existing.

"Section Two: The provisions of this Act shall go into effect immediately upon its passage and approval by the Governor.

"Approved October 7, 1932." (Emphasis supplied.)

Quite obviously the Code of Alabama 1940 brought the phraseology of the Act forward with a change of the underscored word "now" to the word "not." To determine whether or not the Code Committee purposely changed this phraseology, and thereby the meaning, intent and scope of the statute, or whether or not this was a mere typographical error on the part of the printer in the publication of the Code, I have reviewed the "Report From Minutes of Code Committee to Legislature" relating to the publication of the Code of Alabama of 1940. At the pertinent section thereof, I find no comment thereon for a change of phraseology being intended. Going beyond this, I have received the original enrollment of the Act on the legislative journals of the Secretary of State's office and find that the word "now" was entered both in the title and body of the Act.

It is, therefore, apparent that the use of the word "not" as embodied in the Code was a typographical error, and the final construction of the statute must be determined on the basis of the word "now" as the true expression of legislative intent.

It was held in *Revenue and Road Commissioners of Mobile County v. State, Ex Rel. Campbell*, 163 Ala. 441; 50 So. 972, that the original journal is the official record and must prevail. Similarly, in the more recent case of *Henry v. McCormack Brothers Motor Car Company*, 232 Ala. 196; 167 So. 256, the court held as follows:

"Court will correct apparent mistakes in wording of statutes where other provisions or legislative journals furnish such means of correcting mistakes as will fairly carry out legislative intent."

See also *Board of Education of Jefferson County v. State*, 239 Ala. 276; 194 So. 881.

On the basis of interpreting the Act in the sense of applying the statutory wording, to-wit, "now existing" and relating it to the effective date of the Act (October 7, 1932), it is clear that your question is properly answered in the negative and you are so advised accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1948.

Hon. Tom C. Garner,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Mortgage Filing Tax.

Mortgages and like instruments given to secure debts within the meaning of Title 51, Section 619, Code of Alabama 1940, when executed to a Federal credit union duly organized and existing under the Federal Credit Union Act (12 U. S. C. 1751, et seq.) by one or more of its members are not subject to the filing tax imposed by said section.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of August 2, 1948, is as follows:

"The matter of charging mortgage tax on mortgages made to a federal credit union has been brought up in this office, and we would like to know if, in your opinion, you consider a mortgage given on real estate and also on personal property, a subject to the mortgage tax, when a member of a credit union is borrowing money from the union? We have in the past been charging mortgage tax on these mortgages, and now the Avondale Sylacauga Employees Federal Credit Union No. 2333, is raising this question, and holding several mortgages until we have received your opinion."

The tax under consideration is that levied under Title 51, Section 619, Code of Alabama 1940, which provides in substance that no mortgage, deed of trust, or instrument of like nature given to secure the payment of a debt shall be received for record unless "a privilege or license" tax of 15¢ a hundred dollars of the debt secured by such instrument is paid at the time that it is offered for record. The mortgagee or the

owner of the instrument is required to pay the tax to the Judge of Probate of the county in which the property conveyed therein is located.

Federal credit unions such as the credit union under consideration are authorized to be created under the Federal Credit Union Act (12 U.S.C. 1751, et seq.) and it is presumed in this case that the credit union in question has been properly organized and exists in accordance with the provisions of said Federal statutes.

Section 18 of the Federal Credit Union Act (12 U.S.C. 1768) is quoted in pertinent part, as follows:

"The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed * * * *"

The subject tax is not a tax on real estate or tangible property, but is a general tax on mortgages, etc., (intangible personal property) which uses the condition attached to the registration as a practical method of collecting the tax. *The Federal Land Bank of New Orleans v. Crosland*, 261 U.S. 374, 43 S. Ct. 385, 67 L. Ed. 703. It would, therefore, appear that Congress has not under Section 18 of the Federal Credit Union Act, or otherwise, consented that mortgages and like instruments coming within the meaning of Section 619, *supra*, when executed to a Federal credit union be taxed.

As a general proposition the property of the United States and its instrumentalities is not subject to taxation by the states, unless the Congress has made such property taxable by its express consent. The objects of State taxation are confined to subjects over which the sovereign power of the State extends. The power to tax implies the power to destroy and such power over an instrumentality of the Federal Government cannot exist. *Culloch v. Maryland*, 4 Wheaton (U.S.) 316 (1819).

The *Culloch* case, which has been consistently followed by the Federal courts to the present date and in which Chief Justice Marshall wrote the opinion, also held in substance that Congress may adopt any appropriate means not prohibited by the Federal Constitution for the accomplishment of a lawful Federal purpose, and that in the exercise of this power it may authorize a private corporation to perform a Federal function.

More recent cases upholding the tax immunity of the Federal Government and its instrumentalities are: *Federal Land Bank of New Orleans v. Crosland*, *supra*; *Maricopa County, Ariz., et al v. Valley National Bank of Phoenix*, 318 U.S. 357, 63 S. Ct. 587, 589, 87 L. Ed. 837; *Federal Land*

Bank of St. Paul v. Bismarck Lumber Co., et al, 314 U. S. 95, 62 S. Ct. 5, 86 L. Ed. 71; *United States v. Allegheny County*, 322 U. S. 174, 64 S. Ct. 908, 911, 88 L. Ed. 1214; etc.

This office has also recognized such doctrine, and has ruled several times that certain instruments including mortgages executed to or owned by the Federal Government and its instrumentalities were not subject to State filing taxes unless the Congress had consented to such taxation. Quarterly Report of Attorney General, Vol. 17, p. 218; Quarterly Report of Attorney General, Vol. 25, p. 169; Quarterly Report of Attorney General, Vol. 19, p. 291; and Quarterly Report of Attorney General, Vol. 24, p. 12. And in one recent opinion this office ruled that a mortgage executed to the Reconstruction Finance Corporation, although delivered or offered by the mortgagor to the Probate Judge for record, is not subject to the mortgage filing tax. Quarterly Report of Attorney General, Vol. 28, p. 122.

In the case of *Federal Land Bank of New Orleans v. Crosland*, *supra*, the United States in reversing the Supreme Court of Alabama, after the Alabama court had held such filing tax valid, as against a mortgage to the Federal Land Bank, held that first mortgages executed to Federal Land Banks shall be deemed as instrumentalities of the government, and shall be exempt from Federal, State, municipal, and local taxation, notwithstanding inconsistent State laws.

I am, therefore, of the opinion that mortgages and like instruments given to secure a debt and coming within the meaning of Title 51, Section 619, Code of Alabama 1940, when executed by one or more of the members of a Federal credit union when created under the Federal Credit Union Act, *supra*, to such credit union are not subject to the filing tax imposed by said section.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 19, 1948.

Hon. B. M. Bains,
Circuit Solicitor,
Blount County,
Oneonta, Alabama.

Solicitors—Chief Clerk.

The 27th Judicial Circuit does not fall under the influence of nor is it affected by Act No. 436, General Acts 1947, page 316.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1948, is as follows:

"I am writing you for your opinion as to whether the 27th Judicial Circuit, composed of Blount and Marshall Counties, with only the one division in Blount where court is held, and two divisions in Marshall where Circuit Court is held, viz: Guntersville and Albertville divisions, is entitled to have a chief clerk to perform certain duties set out in an act by the State Legislature, approved September 25th, 1947, and found on page 316-317 of the General Acts of 1947. House Bill No. 436."

The Act allowing solicitors in certain circuits a chief clerk is Act No. 463, General Acts 1947, page 316, approved Sept. 15, 1947. The pertinent part in this Act, insofar as your inquiry is concerned, reads as follows:

"Section 1. That in all judicial circuits that now is or may hereafter be composed of only two counties, one of which such counties is now or may hereafter be divided into two jurisdictions or judicial divisions with the holding of the Circuit Court in each jurisdiction or judicial division of such county so divided and said Circuit having only two Judges, * * * *."

The 27th Judicial Circuit was created by Act No. 378, General Acts 1947, page 269, approved August 16, 1947. Marshall County was taken from the 9th Judicial Circuit and Blount County was taken from the 16th Judicial Circuit and combined in Act No. 378 as the 27th Judicial Circuit of Alabama. It is provided in Section 3 of Act No. 378, supra, that within thirty days after the passage and approval of the Act, the Governor shall appoint the Judge of the new Circuits created by the Act. It, therefore, appears that the 27th Judicial Circuit only has one judge.

Act No. 463, supra, among other things, provides that it shall apply in all circuits "having only two judges."

I must, therefore, determine what is meant by the phrase "having only two judges," as used in Act No. 436, supra.

46 Corpus Juris, pages 1105-1106, defines the word "only" as follows:

"As an Adverb. Entirely; exclusively, in no other mode; merely; nothing else, nothing more; solely; utterly, wholly."

It appears from the above definition that the word "only" when used as an adverb, as it is used in Act No. 436, supra, means, among other things, "nothing else" or "nothing more."

Applying this definition to the word "only" as it is used in this act, it appears to me that the legislature intended the act to apply only to those circuits that have no less nor no more than two judges. In other words, the act says what it means, and means what it says; that is, it applies to those circuits having two judges.

It is, therefore, my opinion that the act is not applicable to your circuit and you are not entitled to a chief clerk as therein provided.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 19, 1948.

Hon. Ira L. Pritchett,
Clerk, Circuit Court,
Marshall County,
Guntersville, Alabama.

Jurors and Juries.

Special jurors are entitled to the same pay for their services as regular jurors.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of January 27, 1948, is as follows:

"I am asking for an interpretation of Senate Bill 126 amending section 98 of title of the 1940 code of Alabama, approved August 7, 1947.

"This section provides in parts as follows:

"Regular jurors, grand and petit, are entitled to four dollars for each day's services, five cents for each mile traveled in going to and returning from court, and ferriage and toll, to be proved by the oath of the juror before the Clerk of the court. The Clerk shall give each juror a certificate, stating therein the number of days he has served, the number of miles he has traveled, the amount of ferriage and toll he has paid, and the amount of compensation to which he is entitled. The certificate shall be receivable in payment of county taxes, and other county dues, and payable out of the county treasury."

"The statute says that 'regular jurors, grand and petit' are entitled to the compensation fixed in section one (1). I want to know

whether or not special jurors or talesmen are included in the language 'regular jurors, grand and petit' and as clerk of Marshall County, should I issue a certificate for them as provided for in this act as if they were regular jurors, grand and petit in other words what are they entitled to receive?

"Question two: Suppose that a juror lives 10 miles from the courthouse and he attends court 5 days and travels 20 miles in going to and returning from court every day during this 5 day period. Should I issue the certificate for 20 miles or for 100 miles? In other words, is he entitled to his mileage each day or for just one trip under the terms of said section of said code as amended by said act."

In answer to your questions, you are referred to Title 11, Section 99, Code of Alabama 1940, which is as follows:

"Tales jurors' fees.—Every person summoned for trial of a capital case, under the provisions of this Code, or for service on a coroner's jury, and attending in obedience to the summons, is entitled to the same per diem and mileage for his attendance as regular jurors, and to be paid in the same manner; other tales jurors are entitled to the same per diem for each day's attendance as regular jurors receive, to be paid in the same manner."

This section clearly refers to Title 11, Section 98, Code of Alabama 1940, as amended by Act No. 297, General Acts 1947, page 148, approved August 7, 1947, which is set forth in your request as Senate Bill No. 126.

These sections are in *pari materia* and the presumption is that the legislature, in its enactment, had in mind the whole subject under consideration and adopted the amendment in the light thereof and with reference thereto. *City of Mobile v. Smith*, 223 Ala. 480, 136 So. 851, 50 American Jurisprudence, page 354.

I, therefore, conclude, in answer to your first question, that the legislature, in amending Section 98, *supra*, did so with full knowledge of Section 99, *supra*, and intended that the amended provisions should also apply to the special jurors therein mentioned so that they are now entitled to \$4.00 per day for their services.

An answer to your second question will be found in an opinion of this office, a copy of which is enclosed, rendered to Hon. John E. Mandeville, Clerk, Circuit Court, Mobile, Alabama, now appearing in Quarterly Report of Attorney General, Vol. 48, page 245, the substance of which is that a juror is entitled to mileage only one time for attending a session of court.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 19, 1948.

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham 3, Alabama.

Tax Collector—Cost of Legal Notices—Publication.

Cost of publishing list of insolvents and list of errors in assessments in accordance with Title 51, Section 209, Code of Alabama 1940, is governed by the provisions of Title 7, Section 718, Code of Alabama 1940, which provides for cost of publication of legal notices or advertisements.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of October 16, 1947, is as follows:

"Section 209, Title 51, 1940 Code of Alabama, requires the Tax Collector to publish twice during the month of July, his list of Insolvents, and there is no rate of pay provided for the publication of such notices, in the above section. The regular rate charged by the papers in this county for such legal notices is 15¢ per line.

"Section 259, Title 51, prescribes a maximum rate of 3½¢ per word for publishing real estate advertised for sale.

"During the month of July this year, I had published in the Birmingham Age-Herald, my list of insolvents, at the rate of 15¢ per line. The State Comptroller refused to pay for the ad, on the basis that 1½¢ per word was all he was legally allowed to pay for such advertisements. Please give me your official opinion as to whether or not Section 251, Title 51, applies to the ad of my 'list of insolvents.' If your opinion is in the negative, please advise if the rate of 15¢ per line, as charged in above mentioned ad is a legal one and a just claim against the State of Alabama, for its pro rata share of the cost of such ad, as per Section 209, Title 51."

I am of the opinion that the cost of advertising or publishing the list of insolvents as required by Title 51, Section 209, Code of Alabama 1940, is governed by the provisions of Title 7, Section 718, Code of Alabama 1940. Title 51, Section 259, Code of Alabama 1940, which prescribes the rates to be charged for publishing notices of sales of real estate for the payment of taxes is not applicable to the rates to be charged for the cost of publishing list of insolvents. The provisions of Title 51, Section 259, *supra*, specifically apply to notices of sale of real estate for the payment of taxes only. Lists of insolvents are considered as legal notices and not notices of sale of real estate for payment of taxes.

Title 7, Section 718, supra, provides for the rates to be charged for the publishing or advertising of a legal notice.

The provisions of this statute are to the effect that any person required to advertise such legal notice in daily newspapers may contract with such papers to charge their then current published commercial rates. In view of this statutory provision, I am of the opinion that you are authorized to contract for the publication of the list of insolvents at the then commercial rates. However, this conclusion is based upon a full compliance with the provisions of Title 7, Section 718, supra.

You are further advised that this opinion is restricted solely to the publication of lists of insolvents as required by Title 51, Section 209, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 20, 1948.

Honorable R. P. McRee,
Assistant Administrator,
Alabama Alcoholic Beverage Control Board,
CAPITOL.

Alabama Alcoholic Beverage Control Board—Taxation—
Refunds.

The Alabama Alcoholic Beverage Control Board is without authority to refund malt or brewed beverage taxes levied by Title 29, Section 43, Code of Alabama 1940, and Act No. 358, General Acts 1945, Regular Session, page 757, approved July 6, 1945.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of June 30, 1948, is as follows:

"It has been the policy of the Alabama Alcoholic Beverage Control Board to grant refunds of the Alabama tax on malt and brewed beverages in instances where the Board believed such refunds were in order and just.

"Refunds authorized by the Board are in various categories, and we list below illustrations of each type of refund.

- "1. A brewery purchases a taxpaid certificate for 10,000 gross of Alabama taxpaid crowns, and after using one-half of that

amount on beer shipped into Alabama ceases to make shipments into this State, and the Alabama taxpaid crowns are returned to the crown manufacturer and restored to his stock, or destroyed, then a refund is made for the unused portion of the Alabama tax.

- "2. A shipment is made by a licensed brewery to a wholesale distributor in a far removed state from Alabama, said shipment bearing Alabama taxpaid crowns. Upon receipt of affidavit to the effect that this mistake was made, and also to the effect that the beer was received in another state, and said beer sold and distributed through trade channels of that state, then a refund is authorized to the brewery for the amount of Alabama tax involved.
- "3. A shipment of beer is made to a licensed wholesaler in Alabama, said merchandise having affixed thereto Alabama taxpaid stamps and, upon arrival or a short time thereafter, said merchandise is condemned and ordered destroyed by Federal authorities as unfit for human consumption, upon receipt of the proper papers showing that same has been destroyed, a refund is made for the amount of Alabama tax involved.
- "4. On shipments of beer to Alabama wholesalers the railroad companies furnish affidavits in triplicate to the effect that they have reimbursed the wholesaler for the amount of beer broken in transit, less the Alabama tax. Upon completion of these papers, then a refund is authorized to the wholesaler for the amount of Alabama tax involved.
- "5. In the process of bottling a certain quantity of Alabama taxpaid crowns are mutilated and thereby causing the brewery to lose not only the Alabama tax but also the cost paid by such brewery for the manufacture of the crowns. In this instance a refund is authorized upon the submission attesting to the number of crowns spoiled.
- "6. In some instances crowns are returned to the crown manufacturer by the brewery because they are damaged and unfit for use. In such instances, upon receipt of properly executed papers by the brewery and the crown manufacturer to whom these crowns are returned, a refund check is authorized in this instance.

"It will be appreciated very much if you will advise us as soon as possible if the Board has the authority to make refunds in the future in cases as outlined above.

"In order to assist you in arriving at your decision we are enclosing a copy of the contract executed by the crown manufacturer, a copy of the contract executed by the breweries and an official taxpaid certificate #2628 marked 'Specimen Copy' which is used

to release taxpaid crowns for the crown manufacturer to the brewery after the Alabama tax has been paid.

"We are also enclosing a copy of the monthly reports required of the crown manufacturer, brewery and wholesaler. These reports are carefully checked by the accounting department who give us an accurate check on the amount of tax due, etc."

In answer to your questions, it is my opinion that the Board does not have authority to make refunds in any of the instances outlined by you, or under any other circumstances.

Statutory or constitutional authority is necessary in order to authorize any public official to refund taxes voluntarily paid.

This rule is set forth in 51 Am. Jur., section 1167, page 1005:

"Taxes voluntarily paid without compulsion, although levied under the authority of an unconstitutional statute, cannot be refunded or recovered back without the aid of a statutory remedy."

The rule is further stated in 51 Am. Jur., section 1179, page 1012:

"The recovery of illegally exacted taxes is solely a matter of governmental grace. In the absence of an authoritative statute, taxes voluntarily, although erroneously, paid cannot be voluntarily refunded, although there may be justice in the claim."

It is my opinion that there is no statutory authority for the Board to refund taxes collected on malt or brewed beverages levied by Title 29, Section 43, Code of Alabama 1940, and Act No. 358, General Acts 1945, Regular Session, page 757, approved July 6, 1945. Since there is no authority to refund these taxes, it is unnecessary to determine at what point the tax liability accrues under said section and act.

Title 29, Section 58, Code of Alabama 1940, provides for the manufacture and distribution of the stamps, crowns, and lids, through which the payment of the tax is shown.

Section 43, supra, and Act No. 358, supra, provide that the tax shall be collected by the Alabama Alcoholic Beverage Control Board; and Section 45 of the same title provides that the stamps, crowns, and lids, which indicate the payment of the tax, shall be affixed to the bottles or containers in which the articles taxed are normally sold at retail.

It has been suggested that Title 29, Section 9, as amended, Code of Alabama 1940, contains a provision which authorizes the Board to refund taxes. This provision is as follows:

"All claims against said moneys received under the provisions of this chapter shall be first audited and approved by the board or

its designated agency, and all such claims so audited and approved by the board or designated agency must then be audited and approved by the state comptroller and the governor before being paid."

Said Section 43, supra, and Act No. 358, supra, are a part of the chapter which contains Section 9, but it is my opinion that the quoted provision of Section 9 sets forth merely a method of approving the payment of such claims as are otherwise authorized under such chapter to be paid. Such provision does not create a claim against the moneys received as taxes, but merely sets forth a method by which the payment of such claims must be approved. Such claims include certain expenses of the administration of the liquor laws and the installation and keeping of a system of records and accounts.

I do not know of any refund statute which is broad enough to include the refund of taxes collected by the Alcoholic Beverage Control Board.

Title 51, Section 913, Code of Alabama 1940, is limited to the refund of taxes "which are paid directly to the department of revenue, * * *."

Title 51, Section 848, as amended, Code of Alabama 1940, is limited to a refund of licenses "paid to the judge of probate or the commissioner of licenses."

Title 51, Section 328, Code of Alabama 1940, is limited to refunds to a taxpayer who "has paid taxes that were not due upon the property of such taxpayers. * * *" This section is limited to a refund of ad valorem taxes.

In part, Title 51, Section 332, Code of Alabama 1940, is written in language broad enough to include the payment of money made under mistake of law or fact upon any illegal tax assessment; but such section contains the proviso, "except the laws relating to taxes to be paid to the state. * * *" This section authorizes appropriate proceedings at law or in equity to recover money paid under mistake of fact or law upon any illegal tax assessment, except, as noted, taxes to be paid to the State. In my opinion, this section does not authorize a refund of taxes paid to the Alcoholic Beverage Control Board. Moreover, the malt and brewed beverage tax is not paid under mistake of law or fact, or upon an illegal tax assessment.

The decisions of the Supreme Court of Alabama support the rule that money paid voluntarily to a public official cannot be refunded or recovered in the absence of statutory authority.

Rice v. Tuscaloosa County, 240 Ala. 4, 198 So. 245;

Rice v. Tuscaloosa County, 242 Ala. 62, 4 So. 2d. 497.

To the same effect is the rule in 61 C. J., Section 1254, page 974:

"In the absence of a valid statute, no executive or administrative officer has power to refund taxes; * * *."

It is, therefore, my opinion, that when taxes have been paid to the Alcoholic Beverage Control Board, there is no authority to refund such taxes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 20, 1948.

Honorable J. S. Freeman, Chairman,
Board of Revenue,
Walker County,
Jasper, Alabama.

Counties—Gasoline Tax Fund.

Court of County Commissioners may pay the compensation of a clerk for keeping the records of a county gasoline tax fund out of such fund.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of July 22, 1948, is as follows:

"The Walker County Board of Revenue was set up by local act of the Legislature approved July 31, 1935. This act provides for a clerk to be appointed by the Board of Revenue. One clerk cannot perform all the clerical work. The Board of Revenue has appointed an assistant to the clerk.

"Under our road construction program it is necessary to keep an accurate and separate account of the detailed costs of each project. The assistant clerk has had full charge of keeping the gasoline fund account. The separate breakdown cost of each project is necessary in order to determine the costs of each job. As the state participates in the cost of these S. A. C. P. jobs we have to make an itemized statement each month to the state. Our assistant clerk has been performing these duties efficiently and well as special employment. For these additional duties we have been paying her \$50.00 per month out of the gasoline fund and charging same to the project or projects. Mr. Turnipseed, State Auditor, questions our right to charge this salary to the gasoline fund, because she does not devote her whole time to keeping these project accounts.

"It would cost Walker County \$175.00 or \$200.00 per month to put on an additional clerk capable of handling this account. This \$50.00 is a part of the cost of the project and is so carried. Please advise me if we have a right to carry this in this way."

My answer to your inquiry is in the affirmative.

It is quite true that Title 51, Section 647, Code of Alabama 1940, reads, in part, as follows:

"* * * The revenue * * * shall not be used for any purposes other than for the construction, improvement and maintenance and supervision of highways and bridges and streets, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes. * * * * *

The question now presents itself as to whether or not the keeping of the records of the county gasoline tax fund is connected with the construction, improvement, maintenance and supervision of highways, bridges and streets.

It is a matter of common knowledge that it is essential that proper records be kept in the proper administration of any fund. The county gasoline tax fund is no exception from this proposition. I do not see how this fund could be properly administered for the purposes set out in the statute unless a competent person kept records of the collections and disbursements from this fund. This is especially true in view of the fact that as pointed out in your request an itemized report must be furnished to the State Highway Department monthly on disbursements of this fund on State Aid County Projects.

The premises considered, you are advised, that, in my opinion, the compensation of a clerk to keep the records of the gasoline tax fund is a proper charge against the fund, and may be said to be an essential part of the construction, improvement, maintenance and supervision of highways, bridges and streets. The keeping of proper records of this fund is just as essential as the hiring of foremen and other persons to work on a public road of a county. Biennial Report of Attorney General, 1936-38, page 707; Quarterly Report of Attorney General, Vol. 10, page 196.

The Examiner's objection to this expenditure on the grounds that such clerk does not devote his entire time to the keeping of these project accounts is not well taken.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 26, 1948.

Hon. J. T. Burch,
Tax Assessor,
Morgan County,
Decatur, Alabama.

Taxation—Tax Assessors—Tax Collectors—Morgan County.

There is no duty on the tax assessor to keep separate the property within the city of Decatur known as Albany from that known as Old Decatur, provided his records are so kept that the city officials of Decatur can properly ascertain the assessable value of the property in that part of the city known as Albany.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of July 12, 1948, is as follows:

"Prior to 1948 that part of the City of Decatur which we call old Decatur and that part of the City of Decatur which formerly was called Albany has had a different tax rate. The tax rate in old Decatur being 8 mills, and the tax rate in that part of Decatur, which formerly was Albany, being 13 mills. In 1947 two Constitutional Amendments were proposed and adopted raising the tax rate in old Decatur 7½ mills, and the tax rate in that part of Decatur which formerly was Albany, 2½ mills, making the tax rate on all the property within the corporate limits of the City of Decatur 15½ mills.

"It has been the duty of the Tax Assessor to separate the property in that part of Decatur which we formerly called old Decatur and that part of the City of Decatur which formerly was called Albany on account of the different tax rates. If I continue to use the old form it necessitates a lot of extra work and bookkeeping on the part of the Tax Assessor and Tax Collector.

"In making out the breakdown on the taxes now since the rate is the same all over the City of Decatur, in your opinion would it be necessary to continue to separate the property in that part of the City of Decatur known as old Decatur, and that part of the City of Decatur known as Albany.

"Will you please give me the benefit of your official opinion on this question."

In answer to your question, you are referred to the opinion of the Justices in *re Act Extending Boundaries of City of Decatur*, 216 Ala. 339, 113 So. 245, in which the court said:

"The effect of the merger of the city of Albany into the city of Decatur was to destroy for the future the existence of the city, Albany, as a distinct municipality, to remove it from all existing statutory and constitutional provisions, and automatically to make applicable to it such provisions as relate to the city of Decatur."

Also, in *Browder v. Board of Commissioners of City of Montgomery*, 228 Ala. 687, 155 So. 366, Justice Brown said that the effect of local laws extending corporate limits of a city to include territory covered by a town was to disincorporate the town, and its territory became part of the city and its property rights including water systems became the property of the city and the town's debts became obligations of the city. See also Title 37, Section 229, Code of Alabama 1940.

The effect of a consolidation and merger of a municipality is to create one city where there are two or more. The new city thus created is subject to all laws pertaining to municipal corporations and, unless there is some unique problems involved, would in no way differ from all other cities in its class.

Turning now to the cities of Decatur and Albany as they existed prior to their consolidation, we find that by Amendment XIII to the Constitution of Alabama 1901, the city of Albany, along with other named municipalities, was authorized to levy and collect a rate of taxation from the property situated therein not exceeding in the total in any one year one per centum of the value of such property as assessed.

Following this amendment, the city of Albany issued its bonds which authorized the bondholders to require the city to levy a tax up to one per cent of the assessed value under Amendment XIII of the Constitution of Alabama 1901 to provide for the payment of the said bonds. Following the issuance of these bonds by the city of Albany, the Legislature of Alabama, on February 4, 1927, passed an act rearranging the boundary lines of the city of Decatur so as to include within the corporate limits of Decatur all the territory theretofore embracing the city of Albany. Local Acts 1927, page 1.

The effect of this Act was to merge the city of Albany into the city of Decatur, thus destroying "the existence of Albany as a distinct municipality, as for the future, and therefore to remove it from all existing statutory or constitutional provisions and automatically to make applicable thereto such provisions as relate to the city of Decatur. The city of Decatur in acquiring this territory, in legal effect, assumed all of the burdens of Albany." Such was the conclusion of the members of this Court as found in *Re Opinion of the Justices*, 216 Ala. 339, 113 So. 245.

The bonds issued by the city of Albany being in default, suits were brought against the city of Decatur (the merger being then in full effect) and judgments obtained, with writs of mandamus also requiring the city of Decatur to levy a tax of one per centum on all property in the territory which was formerly the city of Albany and apply the

needed portion of such tax to the payment of the said judgments until they were satisfied. The city of Decatur resisted the mandamus proceeding upon the theory, in part, that said city was limited by the Constitution to a tax levy of one-half of one per centum, and that as the existence of the city of Albany was destroyed by the merger, there was no authority for the levy of the tax of one per centum.

This litigation reached the United States Circuit Court of Appeals, Fifth Circuit, where the holding was that the rate of taxation, which a municipality was authorized to levy at the time of the issuance of the bonds, became a part of the obligation of the contract for the payment of such bonds, and that the holders of the bonds reduced to judgment can compel levy of the full authorized tax rate of the debtor municipality when necessary to enforce payment of the judgment. *City of Decatur v. Thames Bank & Trust Co.*, 84 F. 2d 105.

Following this decision, the city of Decatur on July 23, 1936, adopted ordinance No. 265 refunding bonds issued by the city of Albany and for the payment of which the city of Decatur had become obligated by the merger, and the judgments thereon, under the provision "Judgment Refunding Bonds Series A."

Later, by ordinance No. 305, the city of Decatur provided for the refunding of these bonds and unconditionally contracted for a continuation of the levy of the tax of one per centum upon the property within the limits of what was formerly the city of Albany and pledged itself to apply one-half of the proceeds of such tax to the payment of the bonds proposed to be issued.

The right of the city to so contract was upheld in *Troup v. City of Decatur*, 236 Ala. 393, 182 So. 817. The net results of the decisions of the court was to allow that part of the city of Decatur which was formerly Albany to be assessed at the rate of one per centum while the remainder of the city of Decatur was limited to a rate of one-half per cent.

Since there was no constitutional amendment such as you described in your request passed in 1947, I assume that you refer to Amendment LII and Amendment LVI to the Constitution of Alabama 1901, both of which were ratified in 1946.

These amendments, among other things, authorized municipalities to levy and collect taxes up to one and one-fourth per centum of the value of the property situated within the municipality (Amendment LVI) and to provide that the city of Decatur could levy the special tax for educational purposes provided for in Section 269, Constitution of Alabama 1901 (Amendment LII), thus raising the possible tax levy of the entire city of Decatur above the one per cent levy which had prevailed in that part of the city which was formerly Albany and removing the tax levels which had prevailed in the city of Decatur since the 1927 consolidation.

Therefore, as long as the city of Decatur levies taxes within the constitutional limitations, but above one per cent, I know of no general law that would require you to separate the property as described in your request.

However, since it is necessary for the city of Decatur to apply five mills of the proceeds of its tax on that part of the city that was formerly Albany to the payment of the bonds provided for in ordinance No. 305, it will be necessary that some method be provided by which the city may ascertain this amount.

It is my understanding, from the additional information which you have furnished me, that your records show, by use of the abbreviations "D" for Old Decatur and "Alb." for Albany, the part of the city in which each piece of property assessed is located so that the city officials may ascertain the total amount of the tax arising from that part of the city that was Albany.

As long as the Tax Assessor's records reflect the assessable value of the property located in what was Albany so that the city officials can properly allocate to the sinking fund an assessment equal to five mills of that assessable property, then, in my opinion, there would be no further duty on the assessor's part to keep separate records.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 26, 1948.

Hon. Philip J. Hamm,
Commissioner of Revenue,
State Department of Revenue,
CAPITOL.

Taxation—Gambling Devices.

1. Pinball machine which is operated, or can be operated, as a game of chance, even though it has no pay-off device, held illegal.

2. The operation of pinball machines gives rise to tax liability under the provisions of Title 51, Section 591, Code of Alabama 1940, and Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, General Acts 1947, page 522.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of January 2, 1948, is as follows:

"Will you please render me an official opinion with respect to the following matters:

"There are operating in this state at the present time a type of coin operated machine commonly known as a pin ball machine. The manner of operating such machine is in general as follows:

"The machine is approximately twenty inches wide, forty inches in length and approximately six inches between the covering glass and the board. It is placed on four legs about waist high at an upward slant from the position of the player. There are several holes in the bottom board about one inch in diameter, which are numbered in varying denominations. The player inserts a coin, usually a nickel, which releases several balls on the bottom board for play. By pulling a spring lever and releasing the same, the player propels the balls, one at a time, upward along the bottom board, where they drop into one of the numbered holes. The total score is electrically calculated by the machine and is the total sum of the numbers of the various holes into which the balls have dropped. There is no reward or prize offered or given as a result of playing the machine. It is operated solely for amusement or entertainment.

"From the above statement of facts will you please advise me as to the following questions:

"(1) Is the operation of such machine illegal;

"(2) a. Does the operation of such machine give rise to liability for a privilege license under Chapter 20, Art. I, Title 51, Code of Alabama 1940; b. If such liability exists, is it under the provisions of Section 591, Title 51, Code of Alabama, 1940, or under the provisions of Section 613, Title 51, Code of Alabama, 1940, as amended by Act No. 688, Approved October 7, 1947, General Acts, Regular Session of 1947."

The machine described in your request is commonly known as a "pinball machine," and, in my opinion, if the pinball machine described in your inquiry is operated, or can be operated, as a game of chance, then said machine is outlawed by the statutes of this State.

Your attention is invited to the Anti-Gambling Device Act of 1931 which is now found in Title 14, Article 4, Code of Alabama 1940. The pertinent provisions of this Act which we are here concerned with is Title 14, Section 283(d), Code of Alabama 1940. This section reads as follows:

"§283. The term gambling device shall include and be deemed to embrace the following: * * * * * (d) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, which is operated or can be operated as a game of chance."

The Supreme Court of Alabama has construed the above quoted statutory provision in several cases where the machines were similar to the one described in your request. In the cases of *One Penny Marble Machine v. State*, 233 Ala. 678, 173 So. 91; and *State v. One 5¢ Fifth Inning Base Ball Machine*, 241 Ala. 455, 3 So. 2d 27, the Supreme Court of Alabama outlawed a machine "which can be operated as a game of chance," even though no payoff or reward was offered. Your attention is invited to the following excerpt from the Court's opinion in the case of *State v. One 5¢ Fifth Inning Base Ball Machine*, supra:

"It is, in our opinion, a machine which can be used as a game of chance. The act did not contemplate that it must be a machine which gives a reward or in the operation of which the proprietor offers an inducement. It is open to use as a game of chance for two or more customers or members of the public who operate the machine and who are tempted to gamble on the result of the game. This was clearly one of the evils at which the act was aimed."

In view of this opinion of the Supreme Court, I am constrained to hold that the pinball machine described in your inquiry comes within the condemnation of Title 14, Section 283(d), supra, even though it does not have a pay-off device or offer a reward of any kind. Cf. Quarterly Report of Attorney General, Vol. 14, page 160.

In answer to your second inquiry, I am of the opinion that the operation of such devices, commonly known as "pinball machines," gives rise to liability for the privilege licenses as required under Title 51, Chapter 20, Article 1, Code of Alabama 1940. This liability is not affected by the legality of such machines. See *Casmus v. Lee*, 236 Ala. 396, 183 So. 185. In the *Casmus Case* the Supreme Court of Alabama held that the fact that punch boards were illegal did not invalidate the statutory provision which imposed an occupation tax thereon. I am further of the opinion that the operation of such machine gives rise to liability for the privilege licenses levied under Title 51, Section 591, Code of Alabama 1940, and Title 51, Section 613, Code of Alabama 1940, as amended by Act No. 688, General Acts 1947, page 522. In support of this conclusion, I invite your attention to the express provisions of Title 51, Section 839, supra, which read as follows:

"§839. Two or more licenses on same business.—Wherever in this title two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 27, 1948.

Hon. J. G. Kimbrough,
Judge of Probate,
Washington County,
Chatom, Alabama.

Mortgage Filing Tax.

The assignment of a vendor's lien is not subject to the mortgage filing tax imposed by Title 51, Section 619, Code of Alabama 1940, and may be admitted to record without payment of such tax, when the mortgage tax has been paid on the deferred payments which are secured by said lien.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of August 13, 1948, is as follows:

"On the 10th day of August 1944 Charles J. Cargile bought of Dr. J. W. Blount certain lands and other property in Washington County, Alabama, for a consideration of \$17,500.00 and executed a Vendors Lien to Dr. J. W. Blount for the unpaid balance of \$12,500.00.

"Dr. Blount paid the required tax and had this instrument recorded at the time of the transaction, and then on August 1st, 1946 transferred and assigned the unpaid balance of \$6828.00 to the Chatom State Bank for that amount of consideration.

"On the 11th day of August 1948 the Chatom State Bank filed in my office for record the transfer or assignment in order that they might have legal authority of record for the cancellation of this Vendors lien.

"Please advise me if the Chatom State Bank is liable for the 15 cent per hundred mortgage tax on the amount of \$6828.00 which was the amount involved in the transaction by the Chatom State Bank with Dr. J. W. Blount."

Your letter appears to present the question as to whether the assignment or transfer of a vendor's lien is subject to a filing tax under the Alabama statutes when the mortgage tax has been paid on the deferred payments, or unpaid part of the consideration of a deed, which are secured by the vendor's lien.

Black's Law Dictionary, Third Edition, at page 1804, defines a vendor's lien as:

"A lien for purchase money remaining unpaid, allowed in equity to the vendor of land * * * * *"

Thus, a vendor's lien is an equitable charge on property to secure a debt, which appears to bring it within the scope of the mortgage filing tax statute (Title 51, Section 619, Code of Alabama 1940).

In defining a lien the same authority, at page 1114, states that it is:

"A charge imposed upon specific property, by which it is made security for the performance of an act. Code Civil Proc. Cal. § 1180; Civ. Code Cal. § 2872; *Vidal v. South American Securities Co.* (C.C.A.) 276 Fed 855, 870.

"A 'lien' is not a property in or right to the thing itself, but constitutes a charge or security thereon. *Koenig v. Leppert-Roos Fur. Co.* (Mo. App.) 260 S. W. 756, 758; *Steagall-Cheairs Fertilizer Co. v. Bethume Mule Co.*, 181 Ala. 250, 61 So. 274, 275; *The Pozman* (C.C.A.) 9 Fed. (2d) 838, 846."

The Supreme Court of Alabama has also followed this definition, for in the case of *State ex rel Hamilton v. Williams*, Probate Judge, 214 Ala. 89, 106 So. 500, the Court with relation to the deed filing tax held very specifically that the assignment or transfer of a vendor's lien was not subject to the filing tax imposed by Act No. 301, General Acts 1923, page 318, approved September 14, 1923. Although this statute has otherwise been amended, the part thereof construed by the Supreme Court in that case is practically identical with the wording of the same part as is now contained in Title 51, Section 618, Code of Alabama 1940.

The Court in so holding reasoned that the assignment of a vendor's lien was not an instrument "which conveys any real or personal property within this state, or which conveys any interest in any such property," but was an equitable charge, a right in equity to subject the land to the payment of the purchase price; hence, nothing more than a chose in action.

Both Section 618 and Section 619, while differing in other respects, make the test whether or not the instrument offered for record is an instrument, "which conveys any real or personal property within this state, or which conveys any interest in any such property." This being so, it appears that the *Williams* case can be applied equally as well to Section 619 as to Section 618. The principle of the *Williams* case has also been followed by the Alabama Courts in the case of the assignment of both a chattel and a real estate mortgage in the cases of *Garrison, Judge of Probate, v. Hamlin*, 215 Ala. 39, 109 So. 106, and *Jefferson County v. Smith*, 23 Ala. App. 421, 125 So. 401.

Inasmuch as it appears from the statements made by you in your letter that a filing tax has been paid both as to that part of the consideration of the deed in this instance which has been paid in cash, and that covered by the deferred payments, your attention is called to

the fact that under such circumstances, and where the filing tax has been paid in full, both Section 618, supra, and Section 619, supra, expressly exempt from any further filing tax the assignment of a vendor's lien or of a mortgage or instrument of like character given to secure such deferred payments or unpaid part of the consideration.

It is, therefore, my opinion that the assignment of the vendor's lien referred to by you is not subject to a filing tax.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 27, 1948.

Hon. John L. Whatley, President,
Board of Commissioners,
City of Opelika,
Lee County,
Opelika, Alabama.

Municipal Corporations—Franchises—Licenses—Constitution
of Alabama 1901, Section 220.

1. City Commission of Opelika not required to grant a license or franchise to operate buses to any and all applicants.

2. City Commission of Opelika authorized to grant license or franchise containing restrictions limiting the operation of buses to certain streets.

3. Different restrictions may be imposed by the City Commission of Opelika on different licensees in the operation of local buses.

4. City Commission of Opelika is authorized to revoke a bus license or franchise where the licensee violates the terms thereof.

5. The granting of bus licenses and the fixing of terms thereof is a matter of discretion of the local authorities of a municipality, and the revocation of same is similarly a matter of discretion so long as revocation is based on violations of the license agreement.

6. The local authorities of a municipality have the broadest discretion in the granting of bus licenses and the imposition of restrictions as to the streets on which such buses may operate and other conditions relating to the service to be rendered.

7. The local authorities of a municipality may, as a matter of discretion, authorize duplicate or parallel bus service within their sphere of municipal jurisdiction.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of July 28, 1948, is as follows:

"We will greatly appreciate your opinion on the questions which are set forth below, the inquiry concerning the granting of license or franchise of motor busses for the purpose of carrying passengers for hire under the jurisdiction of the City of Opelika, Lee County, Alabama:

"1. Is the City Commission required to grant license or franchise to any and all applicants for the privilege of operating such busses?

"2. Is the City Commission authorized to grant license or franchise containing restrictions limiting the operation of said busses to certain streets?

"3. May different restrictions be imposed on different licensees?

"4. Is the Commission authorized to revoke licenses or franchise where licensee violates the terms thereof?

"5. In such matters may the Commission exercise discretion in granting license, fixing terms thereof and revoking same?

"6. In the event license is granted to an applicant for the operation of such busses, and in the course of such operation another application is received for operation on parallel routes, or give services which is a duplication in whole or in part of that furnished by the first licensee, does the Commission have the right to refuse to grant license to the second applicant, or if granted, may the Commission impose restrictions on the second applicant as to the streets on which operations may occur, and other conditions relating to the services to be given?

"7. Where a license is granted for the use of streets as stated, and the services given by the licensee are not adequate and another and second application is made for license, does the Commission have the right and discretion to call on the holder of the first license to improve the services to meet the demand, and in the event such is not done, may the Commission as an alternative grant license to the second applicant authorizing use of the streets to parallel or duplicate the services of the first applicant?

"Your opinion on these questions will be appreciated at your earliest convenience."

Municipal corporations are bodies politic created by the State Legislature. All of their powers, duties and authority stem from the State. Thus, the power to grant franchises is primarily in the State and can be exercised by a municipal corporation only under a proper delegation of such power to it expressed or implied from other powers given it. Constitutional and statutory law relating to municipal corporations must be strictly adhered to in determining their authority, and the terms of the municipal charter must also be considered in each case.

Your first inquiry relates to the question of whether or not the City Commission of Opelika, within its sphere of jurisdiction, is required to grant a license or franchise to any and all applicants seeking the privilege of operating local buses.

My answer is in the negative. Constitution of Alabama 1901, Section 220, reads as follows:

"§ 220. No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction of operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village."

Interpreting this constitutional section, the Supreme Court of Alabama has held that the granting or refusing of the use of the streets and public highways in a city is within the discretion of the constituted authorities of the city. *McLendon v. Boyles Transit Company*, 210 Ala. 529 98 So. 581; *Birmingham v. Hood-McPherson Realty Co.*, 233 Ala. 352, 172 So. 114, 108 A.L.R. 1140. In *Birmingham Interurban Taxicab Service Corporation v. McLendon*, 210 Ala. 525, 527, 98 So. 578, the court held that the purpose of Section 220, supra, was to vest control of streets in the municipal authorities—they being best informed as to local conditions. Further that in such manner the conveying of public safety and convenience could best be accomplished.

Under the cited authorities, unless the City Commission were to act in an arbitrary, unreasonable or discriminatory manner (as to violate constitutional guarantees of these basic rights), the granting of licenses or franchises for the privilege of operating buses within the jurisdiction of the City of Opelika would be a matter directing itself strictly to the sound discretion of the said local authorities.

In your second question you inquire as to whether or not the City Commission is authorized to grant a license or franchise which contains restrictions limiting the operation of buses to certain streets.

The City Commission has this authority. Such control of public safety and public convenience falls under the municipal police power. The Supreme Court, in the case of *Bush v. Jasper*, 247 Ala. 359, 24 So. 2d 543, held in part as follows:

"* * * It is within the irrevisable discretion of the city authorities to determine whether and to what extent, the service is needed and to fix and determine the streets and to name the grantee of the right."

Your second question is therefore answered in the affirmative.

In your third question you inquire as to whether or not different restrictions may be imposed on different licensees. Under the authority of the *Bush Case* cited in answer to question two above, it is my opinion that the City Commission is vested with such authority. See also *Montgomery v. Orpheum Taxi Co.*, 203 Ala. 103, 106, 82 So. 117. Here again it is assumed that the City Commission would not act in such a purely arbitrary and unreasonably discriminatory manner as to violate constitutional guarantees of these basic rights. Your third question on this basis is, therefore, answered in the affirmative.

Your fourth question asks whether or not the City Commission is authorized to revoke a license or franchise where the licensee violates the terms thereof. Under such circumstances as herein discussed, it is my opinion that the agreement awarding licenses or franchises is no more than a contract between the grantee and the municipal corporation, and that the same basic principles governing the law of contracts are applicable. 26 Corpus Juris, Franchises, Section 32; *Horst v. Moses*, 48 Ala. 129. The violation of a contract (terms and conditions) subjects a contract to rescission. 13 Corpus Juris, Contracts, Section 661. Your fourth question is, therefore, answered in the affirmative.

In your fifth question you ask whether or not in such matters the City Commission may exercise discretion in granting licenses, fixing the terms thereof, and revoking same. That the City Commission may exercise discretion in the granting of licenses and fixing the terms thereof has been discussed hereinbefore. As for the exercise of discretion in revoking same, it is my opinion that there must be factual support showing a violation of the license agreement before such discretion may be acted upon. However, when such factual support is established, the license, in my opinion, is subject to revocation at the discretion of the City Commission.

Your sixth inquiry deals with the question of the City Commission's authority in refusing a second applicant a license which would result in duplication of service in whole or in part, and whether, if granted, the City Commission has the right to impose restrictions and conditions on said second applicant. This question is answered in the affirmative on the basis of authorities cited hereinbefore, with particular reference to the *Bush Case*, supra.

Your seventh and last inquiry poses the question of the authority of the City Commission to request a licensee to improve service where said licensee's service is inadequate, and upon failure to comply with such request, whether or not the City Commission may grant a license to a second applicant authorizing duplication of service.

Where a licensee is not rendering adequate service and refuses, upon demand, to fulfill the conditions of his license agreement, it would be a sounder practice to revoke said license before issuance of a second license authorizing parallel or duplicate service. However, on the basis of the authorities cited, it is my opinion that such is a matter that directs itself strictly to the sound discretion of the local authorities. Your seventh and last question is accordingly answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 27, 1948.

Hon. S. Fleetwood Carnley, Director,
Department of Industrial Relations,
CAPITOL.

Child Labor—Sheriffs.

It is the duty of local law enforcement officers, such as sheriffs, constables and policemen, to enforce the child labor laws in this State.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion is as follows:

"Your advisory opinion is requested on the following question which has been submitted to us by an Attendance Supervisor of one of the county school systems. The question is one which has come up before, particularly with respect to municipal peace officers. In view of its overall importance with respect to the enforcement of the Child Labor Law, we should appreciate the benefit of your views.

"The question is: Do the local law enforcement officers share with the Child Labor Division of the Department of Industrial Relations the responsibility for enforcing the Child Labor Laws of this State?"

My answer to your inquiry is in the affirmative.

It is the duty of local law enforcement officers, such as sheriffs, constables and policemen, to ferret out criminals and to apprehend and arrest criminals and furnish evidence against them. Title 54, Section 5(4), Code of Alabama 1940. Under the statutory law of this State any violation of the Child Labor Law is made a misdemeanor, and is, therefore, a crime wherever and whenever committed in the State of Alabama. Title 26, Section 374, Code of Alabama 1940.

The Supreme Court in the case of Jones v. Buckelew, 247 Ala. 745, 25 So. 2d 23, has recognized the fact that policemen and other law enforcement officers of municipalities are on the same footing with sheriffs insofar as their duty to ferret out crime is concerned. Chapter 7, Title 15, Code of Alabama 1940, and particularly Section 152 thereof, confers upon policemen and other municipal law enforcement officers the same power to arrest with or without a warrant as is conferred upon sheriffs, constables and marshals in this State.

It is, therefore, my opinion, in view of the above, that local law enforcement authorities, including policemen, marshals, sheriffs and constables, not only have the power to enforce the Child Labor Laws of this State, but must in their general duties as such officers, undertake such enforcement, and you are so advised.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

August 27, 1948.

Hon. Ralph P. Eagerton,
Chief Examiner,
Department of Examiners of Public Accounts,
CAPITOL.

Taxation—Sales Tax—Schools.

Purchases of merchandise and commodities out of school funds are exempt from the State Sales Tax, however, such purchases from funds as realized from athletic events are not exempt.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of June 9, 1948, is as follows:

“You are respectfully referred to the following opinions of your office.

“Volume 7, Page 218, authorizing County Board of Education to purchase athletic equipment with general school funds

“Volume 19, Page 113, authorizing use of public school funds to be used for construction of lighting system for football field.

“Volume 18, Page 310, sale of materials for use in maintenance, upkeep, repair and replacement of public school buildings and prop-

erty belonging to city or town are not subject to the sales tax, General Acts 1939, Page 16.

"The county schools generally, and city schools in particular, operate school canteens and lunch rooms for the convenience and health of the pupils. Some schools operate concessions at athletic events and make sales to the general public.

"The profits in each of these go to the schools and are used exclusively for school activities.

"You are respectfully requested to render an official opinion as to liability for the payment of the State Sales Tax by County and City Schools, if any, on the following:

"1. On merchandise purchased for resale to the pupils and the public under conditions described above.

"2. On purchase of athletic equipment to be used by the schools with general school funds.

"3. On purchase of athletic equipment to be used by the schools with funds realized from athletic events."

Your first and second inquiries must be answered in the negative, as Title 51, Section 755, Code of Alabama 1940, as amended by Act No. 303, General Acts 1947, page 155, expressly exempts from the sales tax the gross proceeds of sales of tangible personal property to the State of Alabama, to counties within the State, and to incorporated municipalities of the State of Alabama. This statutory provision, as amended, reads as follows:

"§1. * * * * * There are however exempted from the provisions of this article and from the computation of the amount of the tax levied, assessed or payable under this article the following: * * * * *

(b) The gross proceeds of sales of tangible personal property to the State of Alabama, to the counties within the state, and to incorporated municipalities of the State of Alabama. * * * * *"

It is my opinion that your third inquiry must be answered in the affirmative, as funds that are realized from athletic events are not school funds. See Biennial Report of Attorney General, 1936-38, page 172. Therefore, the expenditure of these funds would not be considered as purchases by the state, counties, or municipalities, and the exemption to such agencies as provided for in Title 51, Section 755, as amended, supra, would not be applicable.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 30, 1948.

Hon. A. B. Jefferies, Chairman,
Board of Revenue & Road Commissioners of Mobile County,
Mobile, Alabama.

Mobile County—Town of Chickasaw—County Elections—Precincts—Wards—Districts—Voting Places—Voting Lists—Title 37, Chapter 2, Article 1, Code of Alabama 1940, Title 37, Section 13, Code of Alabama 1940, Title 17, Sections 38-40, Code of Alabama 1940, as amended by Act No. 482, General Acts 1947, page 331, Title 62, Sections 97 and 99, Code of Alabama 1940.

Duties devolving upon board of registrars, judge of probate and county governing body of Mobile County upon incorporation of the Town of Chickasaw as a municipality outlined with reference to the holding of county-wide elections.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of July 1, 1948, is as follows:

“Your official opinion is respectfully requested on the following important question:

“What designation shall be given to, or how shall the Town of Chickasaw in Mobile County be carried or referred to in all county-wide elections hereafter held in Mobile County, and what are the respective duties devolving upon the Board of Registrars, the Probate Judge and the county governing body resulting from such incorporation and relative to such Town in the holding of county-wide elections?

“For your information, the Town of Chickasaw, carved wholly from within the area of county Precinct 32 in Mobile County, became incorporated following an election to such effect held on November 14, 1946. No separate list of the qualified voters in the corporate area of the Town of Chickasaw has as yet been made up and furnished to the Probate Judge by the Board of Registrars.

“Our county governing body has been advised by its attorney that it is his opinion that the formal creation of the Town of Chickasaw in legal effect established a separate voting area in this County which should be recognized and carried as the Town of Chickasaw, for and in which the county governing body should designate a voting place but with no other division of such Town unless the town council acted to create voting wards or districts therein, and for which Town the Board of Registrars should make up and furnish to the Probate Judge a separate list of the qualified voters therein.

"Your attention in answering this request is invited to the opinion of your office rendered October 12, 1944, to the Probate Judge of Mobile County. OAG, 4Q, 1944 P 22-30."

Under Title 37, Chapter 3, Article 1, Code of Alabama 1940, provisions are made for the incorporation of municipalities. Title 37, Section 13, Code of Alabama 1940, specifically reads as follows:

"§13. Census enumeration of inhabitants.—Within five days after the election, the inspectors must certify the result to the judge of probate, who must, if a majority of the votes cast at the election are for 'corporation' cause an enumeration of the inhabitants residing within such territory to be made by such inspectors, or other persons appointed by him, and, within three days after such enumeration has been completed and returned to him, shall make an order to be entered of record in the minutes of the court, that the inhabitants of such territory are incorporated as a town or city, as the case may be, by the name and with the boundaries shown by the petition; thereupon such town or city shall be vested with the rights and powers herein granted, incident to such corporations."

Under this section of the Code it is seen that after a majority vote favoring incorporation, the judge of probate is charged with the enumeration of the inhabitants residing within the newly formed municipality and he must set this forth on the record of the minutes of his court, together with the name of the municipality, and the official boundaries of same as shown by the petition.

In an opinion rendered to Hon. E. J. (Gunny) Gonzales, under date of July 2, 1948, this office held in part as follows:

"* * Under the laws of this State governing registration of voters, the members of the Boards of Registrars alone have any authority to transfer an elector from one voting precinct, or ward, to another, in the absence of action on the part of the voter himself, or to purge the name of any qualified elector from the registration list. Biennial Report of Attorney General, 1934-36, page 702. The official lists of qualified electors required by law to be published by the Judge of Probate is compiled solely from the information furnished such Judge of Probate by the Board of Registrars of the county.—Title 17, Sections 38-40, Code of Alabama 1940, as amended by Act No. 482, General Acts 1947, page 331. Such was the holding of this office in an opinion rendered the Honorable F. B. Lloyd, Judge of Probate, Crenshaw County, Alabama, under date of March 19, 1948."

In consideration of this cited opinion and the authorities cited therein, it is my judgment in the instant case that after the judge of probate has officially complied with Title 37, Section 13, Code of Alabama 1940, *supra*, i.e., by entering on the minutes of his court the enumeration of the inhabitants of the newly formed municipality, the name of the newly formed municipality and the boundaries of the newly formed municipality,

the board of registrars would then compile a revised list of electors for Precinct 32 and a new one for the Town of Chickasaw.

It is my judgment that this would be done by compiling one new list designated for the Town of Chickasaw and would include those qualified electors residing within the official boundaries of Chickasaw as shown on the record of minutes of the judge of probate. The remainder not so transferred from the old list for Precinct 32 would constitute the new list for Precinct 32. The list for Chickasaw would, in my opinion, be designated and referred to as the list for Chickasaw under whatever official name is spread on the minutes of the judge of probate as the official name of the municipality. In compliance with Title 17, Section 54, Code of Alabama 1940, as amended by Act No. 483, General Acts 1947, page 333, the board of registrars would submit this list subdivided by wards or other subdivisions if the Town of Chickasaw has been so further subdivided.

These lists should be certified by the board of registrars to the judge of probate. Upon receipt of same, the judge of probate should draft therefrom his official lists of registered electors for both Precinct 32 and the Town of Chickasaw in compliance with Title 17, Sections 38-40, Code of Alabama 1940, as amended by Act No. 482, General Acts 1947, page 331.

It is noted that under the authority cited above (Act No. 482, General Acts 1947, page 331), the judge of probate is charged with making "correct alphabetical lists of all the qualified electors registered by precincts, and by districts or other subdivisions where the precinct has been divided or subdivided, if not within a city or incorporated town, and by wards or other subdivisions, if within a city or incorporated town, and who have paid all poll tax due."

Similarly, Title 62, Section 97, Code of Alabama 1940, applicable to Mobile County, reads as follows:

"§97. Lists of voters.—The probate judge of the county shall separate the list of qualified registered voters in said wards or districts that lie within the said limits of each incorporated city or town or that are commonly known and considered as city wards or districts as shown by the list on file in the office of the judge of probate in said county, into groups of not more than six hundred qualified registered voters in alphabetical order."

A discussion on these sections of the Code is hereinafter made.

In an opinion of this office reported in Quarterly Report of Attorney General, Vol. 37, page 21, it was held in part as follows:

"* * I am of opinion that, under the provisions of Title 62, § § 95-103, there can be but one voting place in any one ward or voting district in an incorporated city or town in Mobile County, to be designated by the governing body of the city or town for municipi-

pal elections and by the county governing body for state and county elections, and that the county governing body is not authorized to divide such areas or territory into election districts. The power to make such divisions resides in the city or town governing body exclusively as implied in Section 102, Title 62, Code 1940 and declared in Tit. 37, Section 7. As to such areas or territory the county governing body's power is limited to designation of a central voting place in each ward or district."

I concur in the above opinion, and further state that if the governing body of the Town of Chickasaw has not divided said municipality into wards or voting districts, then the probate judge is charged with compiling alphabetical lists for the Town of Chickasaw as a whole, arranged into groups of six hundred qualified registered voters in accordance with Title 62, Section 97, Code of Alabama 1940. This is on the premise that the municipal governing body has the exclusive right to subdivide the municipality into wards and districts and is in accord with the opinion reported at Quarterly Report of Attorney General, Vol. 37, page 21, cited supra. Title 62, Section 99, Code of Alabama 1940, applicable to Mobile County, reads as follows:

"§99. How precincts designated.—In all state and county elections, general, primary and special, the county governing body shall designate the place where the qualified voters at any such election shall cast their ballots, and the board of commissioners, or other governing bodies of like jurisdiction in each incorporate city or town in said counties, shall designate in any municipal election the place at which qualified voters at such elections in said city or town shall cast their ballots. Provided, however, that the places so designated shall be located as near the center of the ward or precinct or district as practicable."

In consideration of this code section and the circumstances hereinabove discussed, i.e., that Chickasaw has not been subdivided into wards or districts by the municipal governing body, it is my opinion that the county governing body of Mobile County is charged with designating one central voting place for the Town of Chickasaw.

If the governing body of the Town of Chickasaw has divided the municipality into wards or voting districts, it is my opinion that the judge of probate is charged with separating the list of qualified registered voters accordingly in compliance with Title 62, Section 97, Code of Alabama 1940, and pertinent parts of Act No. 482, General Acts 1947, page 331, hereinbefore cited.

Similarly, in the event that the governing body of the Town of Chickasaw has divided the municipality into wards or voting districts, it is my opinion that under Title 62, Section 99, Code of Alabama 1940, applicable to Mobile County, cited supra, the county governing body of

Mobile County would, in such a case, be charged with designating the voting place in each ward or district.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 31, 1948.

Miss Sibyl Poole,
Secretary of State,
CAPITOL.

Elections—Candidates—Nomination—Certification—Ballot.

1. Names of candidates for public office may appear but one time on the ballot.

2. Persons properly qualified as candidates for public office, both as independent candidates and as nominees of a political party, may express their choice as to the manner in which their names shall appear upon the official ballot, and the certifying officer shall certify such names in accordance with the expressed wishes of the candidates.

Opinion by Assistant Attorney General Hardin.

Dear Miss Pool:

Your request for an official opinion bearing date of August 24, 1948, is as follows:

“Under the provisions of Section 145 of Title 17 of the Code of 1940 as amended, there was filed in my office on May 3, 1948 eleven petitions signed by more than 300 qualified electors requesting that the following eleven independent candidates for the office of Presidential Elector be placed on the ballot in the general election:

Jesse L. Dansby

Joe M. Goodwin

Ralph Hopkins

Herbert P. McDonald

Frank R. McGhee

Robert D. Morgan

Joanna Newhouse

Allison H. Stanton

Vivian Thomas

Robert F. Travis

William A. Upshaw

"Declarations of candidacy of these eleven independent candidates were also filed on that date.

"Later, on June 4, 1948 there was filed in this office official minutes of a mass meeting held on May 4, 1948 (under the provisions of Sections 413-416 of Title 17 of the Code as amended) together with certificate of nomination of the above eleven electors to be placed on the ballot under the emblem of the Progressive Party. One Hundred Fifty copies of the emblem as required by Section 149 of Title 17 of the Code were also filed.

"I would like your opinion as to whether or not I should certify these electors as independents and also as electors of the Progressive Party.

"Since Section 145 of Title 17 of the Code requires that the names be certified to the Probate Judges not less than sixty days before the day of election, and as that time is drawing near, I shall appreciate your advice at the earliest possible date."

In my opinion, your inquiry must be answered in the negative.

Title 17, Section 145, Code of Alabama 1940, as amended by Act No. 79, General Acts 1945, page 76, in prescribing the names of those candidates to be placed upon the ballot used in the general election and the method of certification of the names of such candidates to the Secretary of State and the judges of probate of the respective counties of the State, provides as follows:

"The probate judge of each county shall cause to be printed on the ballots to be used in their respective counties, the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, primary election, or other assembly of any political party or faction in this state, and certified in writing and filed with him not less than sixty days previous to the day of election. The certificate must contain the name of each person nominated and the office for which he is nominated, and must be signed by the presiding officer and secretary of such caucus, convention, mass meeting, or other assembly, or by the chairman and secretary of the canvassing board of such primary election. In case of a person to be voted for by the electors of the whole state or of an entire congressional district, judicial circuit, or senatorial district for any state or federal office, the certificate of nomination must be filed in the office of the secretary of state not less than sixty days before the day of election; and the secretary of state must thereupon immediately certify to the judge of probate of each

county in the state, in case of an officer to be voted for by the electors of the whole state, and the judges of probate of the counties composing the circuit or district, in case of an officer to be voted for by the electors of a circuit or district, upon suitable blanks to be prepared by him for that purpose, the fact of such nomination and the name of the nominee or nominees and the office to which he or they may be nominated. The judge of probate shall also cause to be printed upon the ballots, the name of any qualified elector who has been requested to be a candidate for any county or municipal office by written petition signed by at least twenty-five electors qualified to vote in the election to fill said office, when such petition has been filed with him before the first Tuesday in May in the year in which a state-wide primary election is held. The Secretary of State shall also certify to the Judge of Probate of the several counties, as the case may be, the name of any qualified elector who has been requested to be a candidate for any state or federal office by written petition signed by at least three hundred electors qualified to vote in the election to fill said office provided such petition is filed with the secretary of state before the first Tuesday in May in the year in which a state-wide primary election is held. The judge of probate shall cause to be printed upon the ballots, the name, or names, of such qualified elector or electors, as the case may be. Provided, however, that the judge of probate of the several counties in this state are hereby prohibited from causing to be printed on the ballot to be used in their respective counties, the name of any independent candidate for any state, county, or federal office who has not filed his declaration to become such a candidate before the first Tuesday in May in the year in which a state-wide primary election is held."

It is to be observed from the above statute that it is the duty of the Secretary of State to certify to the judges of probate of the several counties, as the case may be, the name of any qualified elector who has been requested to be a candidate for any state or federal office by written petition signed by at least three hundred electors qualified to vote in the election to fill said office, provided such petition is filed with the Secretary of State before the first Tuesday in May in the year in which a state-wide primary election is held, and that the judges of probate shall cause to be printed upon the ballot the name, or names, of such qualified elector or electors, as the case may be.

It is further provided by this statute that the judges of probate of the several counties shall not place such names upon the ballot unless such candidates have filed their declaration of candidacy prior to the first Tuesday in May in the year in which a state-wide primary election is held.

In connection with the above provision, relative to the certification of names of candidates by the Secretary of State, it has been held by a former opinion of this office that it is the duty of such officer to reasonably satisfy himself, or herself, that of the names signed to the petition at

least three hundred are electors of the State or district in which the office is sought. Biennial Report of Attorney General, 1934-36, page 4.

From your request, I understand that the petitions of electors here concerned are regular upon their face, that there is affixed to such petitions the required number of names of purported electors, and that you are reasonably satisfied that of such names at least three hundred are of persons who are qualified electors of the State. Furthermore, that the eleven persons petitioned to become candidates have filed with you prior to May 4 their declaration of candidacy. Such being the case, it is my opinion that the eleven persons here considered have properly qualified to have their names certified by you to the judges of probate of the several counties, to be placed upon the ballot to be used in the general election as independent candidates for the office of Presidential Elector.

In your request, you further advise me that there has been filed with you, as Secretary of State, official minutes of a mass meeting held upon May 4, 1948, by the Progressive Party of Alabama, accompanied by a certificate of nomination of the same eleven persons as nominees of such party for the office of Presidential Elector, to be placed upon the ballot in the general election under the emblem of the Progressive Party, copies of which emblem have been filed with you as required by law.

I have examined the official minutes of such mass meeting, as filed with you, and also the accompanying certificate of nomination of the eleven persons nominated for the office of Presidential Elector, and I find such minutes and certificate regular upon their face. From the official minutes of such mass meeting, it appears that said meeting was held under, and in conformity with, the provisions of the statutory law of this State relative to such meetings or assemblies. These statutes are found set out within Title 17, Sections 413-416, Code of Alabama 1940, Section 414 having been subsequently amended by Act No. 113, General Acts 1947, page 34. Such statutes provide, in pertinent part, as follows:

"§ 413. When any political party shall desire to hold any mass meeting, beat meeting, or other meeting of the voters of such party for the purpose of nominating any candidate or candidates for public office, to be voted for in a general election in Alabama or for the purpose of selecting delegates, or other representatives to any convention which may select such candidates for public office, or when any such party shall desire to hold such mass meeting, beat meeting, or other meeting of the voters of such party for the purpose of selecting committeemen, representatives or other party officers of such party; all of such meetings shall be held at the times and places set out in the succeeding section, and at no other times or places."

"§ 414. All such meetings shall be held in a hall, room or open place at or in the immediate vicinity of the voting place of the respective precinct or voting district and on the first Tuesday in May in even-numbered years. The general public is privileged to attend such meetings, but not to participate."

From the above statutes, it will be observed that when the members of any political party desire to hold an assembly of voters for the purpose of nominating candidates for any public office to be placed upon the ballot to be used in the general election, or for the purpose of electing delegates to attend a later convention to be held for the purpose of nominating such candidates, such assembly must be held in conformity with the provisions of the statutes above set out. It has been held, both by former opinion of this office and by the Supreme Court of Alabama, that the provisions of the above statutes are mandatory and that the actions of any assembly of voters held at a time other than that prescribed therein are invalid, and that candidates nominated at any such irregular meeting are not entitled to have their names placed upon the ballot. Quarterly Report of Attorney General, Vol. 28, page 178. *Kinney v. House*, 243 Ala. 393, 10 So. 2d 167.

As stated, I have examined the official minutes of the mass meeting as filed in your office and also the accompanying certificates of nomination, and, in my opinion, it appears therefrom that such mass meeting, or assembly, was regularly conducted in accordance with the provisions of Title 17, Sections 413-414, *supra*, and that the certificate of nomination is properly prepared and sufficient to authorize you to certify the names of those candidates therein nominated to the judges of probate of the State for inclusion upon the ballot to be used in the general election under the emblem of the Progressive Party.

It, therefore, appears that the eleven persons here considered have properly qualified with you by two methods to have their names placed upon the ballot in the general election as candidates for the office of Presidential Elector and your inquiry directs itself as to whether you shall twice certify the names of such persons as candidates.

As I have previously stated, in my opinion, such inquiry must be answered in the negative, for the reason that it is specifically set out in Title 17, Section 148, Code of Alabama 1940, that the name of each candidate shall appear but one time on said ballot, and under only one emblem. This statute provides, in full, as follows:

"§ 148. The ballots printed in accordance with the provisions of this chapter shall contain the names of all candidates nominated by caucus, convention, mass meeting, primary election, or other assembly of any political party or faction, or by petition of electors and certified as provided in section 145 of this title, but the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the judge of probate in writing, acknowledged before an officer authorized by law to take acknowledgments, that he will not accept the nomination specified in the certificate of nomination or petition of electors. The name of each candidate shall appear but one time on said ballot, and under only one emblem." (Emphasis supplied)

It appears that the appellate courts of this State have never had occasion to pass upon the above statutory provision prohibiting the dupli-

cation of a candidate's name on the official ballot, however, such has been a matter of decision by the courts of numerous other states of the nation.

On the general subject of control of the legislature over the ballot, it is said in 9 R. C. L. 1046:

"Constitutional provisions are specific and largely exclusive in regard to the qualifications of voters, but they are necessarily general in prescribing the way in which the voting shall be done, this being left almost wholly to statutory direction. And so the legislature has the power to establish all reasonable regulations of the right of franchise, and may control and regulate the ballot so long as the right is not destroyed or made so inconvenient that it is impossible to enjoy it. Where such regulations are imposed for the purpose of guarding against fraud, undue influence, and oppression, and of maintaining the secrecy of the ballot, they are clearly within the legislative power. The courts are inclined to take a liberal view of legislative authority in the matter, particularly where the law is passed for the purpose of securing the purity of the ballot, and all doubts will be resolved in favor of that authority. Laws so designed will not be declared invalid merely because their enforcement may result in the restriction of the right to vote, although if the legislature destroy or unnecessarily impair the right of suffrage its acts cannot be upheld."

In 78 A. L. R., page 398, it is stated that most of the controversy in the courts on the present question centers around the constitutionality of statutes having for their object the prevention of duplication of a candidate's name on the official ballot. Except in California and New York, the decisions in which have been liberally criticized by some of the other courts, the constitutionality of statutes prohibiting the placing of a candidate's name more than once upon the official ballot seems to have been uniformly sustained. Cited cases include those of Idaho, Illinois, Michigan, Montana, North Dakota, Ohio, Utah, Washington, and Wisconsin.

In the North Dakota case above referred to, *State Ex rel. Fisk v. Porter*, 13 N. D. 406, 67 L. R. A. 473, 100 N. W. 1080, the Supreme Court of that state considered a situation identical to that presented by your request, that is, where a candidate was once nominated by a political party and again by petition of electors and sought to have his name twice placed upon the ballot. In that case, the court sustained the constitutionality of the statute in that state which prohibited the printing of a name of a candidate for office in more than one column of the official ballot, stating that at least where a candidate has not been nominated by two political parties, but only by one party and independently by petition, electors' rights are neither destroyed nor impaired by the refusal to print the candidate's name in more than one column and it is reasonable under such circumstances that the State should not be compelled to print the candidate's name in more than one column on the official ballot.

I am, therefore, of the opinion that, by the overwhelming weight of authority, the provision of the election laws of this State prohibiting any candidate from having his name placed upon the official ballot more than once was validly enacted and that the names of the eleven candidates here concerned may not be placed on the official ballot both as independent candidates and as candidates of the Progressive Party.

The question naturally arises, and you have indicated that you wish my opinion, regarding the manner in which such names should be certified by you to the various judges of probate. This is a question upon which our statutes are silent, and, in my opinion, is a matter resting within the legislative power to control. Certain of our sister states have statutes providing that the manner by which first nominated is the manner in which the names of such candidates shall be placed upon the ballot; others vest a power of discretion in the certifying officer as to the manner in which such names shall be placed upon the ballot where no choice has been indicated by the candidate, while others provide that the candidates themselves, when legally nominated by two or more methods, may express a choice as to how their names shall be placed upon the ballot by declining one nomination and accepting the other.

Inasmuch as the statutes of this State do make provision for the declining of any nomination by the person so nominated, Title 17, Section 148, *supra*, it is my opinion that, in the absence of legislative instruction on the subject, the proper and just method to be pursued by you would be to ascertain from the candidates themselves the manner in which they desire their names to be placed upon the ballot, and that when so ascertained you certify to the judges of probate the names of such candidates as either independent candidates or as nominees of the Progressive Party, but not as both.

With regard to the instant case, I am advised by you that the persons here concerned have informed you that, in the event they have properly qualified both as independent candidates and as nominees of the Progressive Party, that it is their desire that their names be placed upon the ballot as nominees of the Progressive Party. Such being the case, it is my opinion that you should certify the names of such persons to the judges of probate of the State to be placed on the ballot to be used in the general election as nominees of the Progressive Party, under the emblem of such party.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 1, 1948.

Hon. G. V. Dismukes, Mayor,
City of Prichard,
Mobile County,
Prichard, Alabama.

Municipal Corporations — Elections — Voting Places — Mobile County — Act No. 465, General Acts 1945, page 699 — Title 62, Sections 96-99, Code of Alabama 1940.

City of Prichard, not having been subdivided into wards, cannot create additional voting places for the forthcoming municipal election scheduled for September 20, 1948.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 24, 1948, is as follows:

"The Mayor and City Council of the City of Prichard, Alabama respectfully requests your official written opinion as to the following question of law connected with their official duties as such public officers.

"The City of Prichard has a population of more than 6,000 according to the last federal census and in reality today has more than 18,000 citizens, over 2,200 are qualified voters.

"The City of Prichard is not divided into wards or voting districts, but in accordance with Section 426, Title 37, Alabama Code of 1940, adopted the resolution therein referred to more than six months prior to the coming municipal election on September 20, 1948, and will elect five aldermen from the city at large.

"It is the wish of the City Council to provide more than one voting place for the convenience of the voters, especially in view of the fact that sizeable territories have been annexed to the city by vote and it is geographically impracticable for the voters in distant areas to journey to the City Hall to cast their ballot.

"Section 34(6), Title 37, Alabama Code of 1940 as amended by General Acts of 1945, page 700, approved July 6, 1945, provides that the voting places shall be fixed by the council, one or more voting places in each ward, where such city or town has been divided into wards.

"However, no provision is specifically made for the establishing of more than one polling place where the City has not been divided into wards, and the General Election law would seem to be to the

effect that not more than one polling place shall be established in any precinct except under certain conditions which are not here relevant.

"Would you please give your official opinion as to whether or not the City Council of the City of Prichard has the authority to establish or fix more than one voting place in the municipal election to be held on September 20, 1948.

"If your answer to the preceding questions be to the effect that they do have such power, may registration lists to be furnished to the election officials at the various voting places established include on the same general list for information the names of all persons entitled to vote in the whole city as provided under the General Election law; Section 90(3), Title 17, Alabama Code of 1940, as amended by General Acts of 1947, page 505, approved October 9, 1947?"

In answering your inquiry, reference is first made to statutory law deemed pertinent.

Act No. 465, General Acts 1945, page 699, at Section 1 thereof, reads as follows:

"§ 1. Elections in cities and towns of this state shall be conducted according to the general election laws except as otherwise provided in this title. This title, however, shall not apply to cities and towns organized under a commission form of government."

Section 2 thereof further provides:

"§ 2. The regular municipal elections in cities and towns shall be held on the third Monday in September, 1948, and quadrennially thereafter. Municipal officers elected at such elections shall assume the duties of their respective offices on the first Monday in October following such election unless herein otherwise provided."

Similarly, Section 6 thereof provides in part as follows:

"§ 6. The voting places shall be fixed by the council, one or more voting places for each ward, where such city or town has been divided into wards, and the elector must vote in the ward of his residence and nowhere else, and if any elector attempts to vote in any ward other than that of his residence, his vote must be rejected. * * * * *." (Emphasis supplied.)

Title 37, Section 7, Code of Alabama 1940, reads in part as follows:

"§ 7. Wards, municipalities divided into.—The councils of the several cities may, by ordinance, divide such city into not less than three nor more than fourteen wards, except as otherwise provided herein, and the numbers and boundaries of such wards may be fixed and changed at any time, except as herein restricted. The

several councils, respectively, of cities, at least six months previous to the first general municipal election held under the provisions of this title, shall divide such cities into wards, having as nearly as may be the same number of inhabitants, the lines thereof conforming to the center of the streets or alleys, and being rectangular as far as practicable. Ward lines having once been fixed, shall not be changed by the council within three months previous to an election, nor within eighteen months of the time last established, except in the case of a census showing a population authorizing a change in the form of government, or unless within such time additional territory shall have been annexed to such city, when such councils shall have the right to create new wards or annex such territory to wards already established. * * * *

In the above noted general statutes, which deal with municipal elections, the legislative expression clearly evidences a legislative intent that the creation of additional voting places in municipalities is related to wards within said municipalities. As contained in the statement of facts, the City of Prichard has not been subdivided into wards. Since the City of Prichard has not been subdivided into wards, there can be but the one central voting place now designated for the city unless and until the city is subdivided into wards. This office has previously held that the power to so subdivide a city into wards is vested exclusively in the city governing body. Quarterly Report of Attorney General, Vol. 37, page 21.

Title 62, Sections 95-103, inclusive, Code of Alabama 1940, relating to elections is specifically applicable to Mobile County.

Sections 96 and 99 thereof further evidence the legislative intent that the creation of additional voting places in municipalities relates to wards within said municipality. Section 96 reads as follows:

"§ 96. Voting places in wards.—The board of commissioners of each incorporated city, or other governing body of like jurisdiction of any city or town in the county, must designate in all municipal elections one voting place in each ward of such incorporated city or town within such county. No change or designation shall be made within thirty days of any election held in such city or town." (Emphasis supplied.)

Section 99 reads as follows:

"§ 99. How precincts designated.—In all state and county elections, general, primary and special, the county governing body shall designate the place where the qualified voters at any such election shall cast their ballots, and the board of commissioners, or other governing bodies of like jurisdiction in each incorporate city or town in said counties, shall designate in any municipal election the place at which qualified voters at such elections in said city or town shall cast their ballots. Provided, however, that the places so des-

ignated shall be located as near the center of the ward or precinct or district as practicable."

Your attention is directed to the underscored portion of Section 96 quoted above. As I interpret this portion of the statute, no designation of a voting place for a ward shall be made less than thirty days before a municipal election. Therefore, even should the City of Prichard now decide to subdivide the municipality into wards in order to provide additional voting places for the convenience of its citizens, and even if Section 96 were construed as controlling and supplanting the restrictions of general law cited at Title 37, Section 7, Code of Alabama 1940, cited supra, it could not effect a subdivision into wards within the time set for the forthcoming municipal election which, as stated, is to be held on September 20, 1948.

In view of the above, the first portion of your inquiry is answered in the negative and an answer to the second portion of your inquiry is unnecessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 7, 1948.

Hon. Festus M. Shamblin,
Tax Assessor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Exemptions—Title 51, Section 12, Code of Alabama 1940.

Y. M. C. A.'s real estate owned and occupied by a duly organized and recognized Y. M. C. A. and used in carrying on its work is exempt from any and all state, county and municipal ad valorem taxes.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of August 23, 1948, is as follows:

"I would be pleased to have you advise me whether or not a house and lot owned by Tuscaloosa County Young Men's Christian Association, Inc., is subject to or exempt from State, County and City ad valorem taxes.

"This house and lot is occupied by the Y. M. C. A. for the official and legal Y. M. C. A. work, and constitutes the Y. M. C. A. building for its offices and its other endeavors and activities.

"I will appreciate this advice at your earliest convenience."

Title 51, Section 12, Code of Alabama 1940, is as follows:

"All real and personal property of all Young Men's Christian Associations, and of any branch or department of same, heretofore or hereafter organized and existing in good faith in the State of Alabama for other than pecuniary gain and not for individual profit, when such real or personal property shall be used by such associations, their branches or departments in and about the conducting, maintaining, operating and carrying out of the program, work, principles, objectives, and policies of such associations, their branches or departments, in any city or county of the State of Alabama, is exempted from any and all state, county, and municipal taxes, licenses, fees and charges of any nature whatsoever. The clause, 'for other than pecuniary gain, and not for individual profit,' as used in this section shall not include any fee, admission, service charge or dues assessed, charged or collected by said associations, their branches or departments from any person, or persons, for any service rendered by such associations, their branches or departments, or for the use or occupancy of any of the real or personal property of said associations, their branches or departments."

Under the provisions of said statute and the facts submitted by you in your letter, I am of the opinion that the house and lot now owned and occupied by the Tuscaloosa County Young Men's Christian Association, Inc., and used by it in its work in that County is exempt from any and all state, county, and municipal ad valorem taxes.

However, your attention is called to the provisions of Title 51, Section 41, Code of Alabama 1940, which requires one entitled to an ad valorem tax exemption to list the property involved with the tax assessor of the county wherein the property is situated and claim the exemption on or before the third Monday in January of each current tax year. A failure to so list the property and claim the exemption results in a loss of the exemption for that year.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

September 7, 1948.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
CAPITOL.

Child Labor—Age Certificate—Physical Examination.

Title 26, Sections 356-357, Code of Alabama 1940, as amended by Act No. 613, General Acts 1947, page 460.

1. Those children sixteen years of age or older making application for an age certificate under the provisions of Title 26, Section 357, as amended, are required to furnish the statement as to physical examination required by Title 26, Section 356, as amended.

2. The requirement as to the statement of physical examination is applicable to all children twenty years of age, or less, whether making application for an age certificate, an employment certificate or a special employment certificate.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 14, 1948, is as follows:

"Question has arisen since amendment of the Child Labor Laws, Act No. 613, 1947 Regular Session, whether medical examination is required before employment of children 16 years of age and over, except as a method of determining age when other acceptable evidences of age are not available. Since most such examinations fall upon the county health officers, and probably most employment of children is of those 16 years and over in age, this is a matter of some importance with regard to demands upon the health officers.

"It is noted that 'employment certificates' are required for children under 16 years of age and 'age certificates' are required for children 16 years of age and over. The amended Section 356 of Title 26 mentions medical examination twice, the first reference being in Subsection 3, Item F, as a last-resort method of determining age when other proofs of age are unavailable; and the other being in Subsection 4, as a fixed requirement for children requiring employment certificates. With regard to age certificates required for children 16 years of age and over, Section 357 of Title 26 of the Code of 1940 stated that these certificates are issued 'in the same manner and upon the same proofs of age as hereinabove required for employment certificates.' However, the amended Section 357

states that age certificates are issued 'in the same manner and upon the same requirements as for issuing employment certificates.' Omission of the clause 'and upon the same proofs of age' creates a doubt as to whether requirements of Subsections 1, 2, and 4 of Section 356 are omitted with regard to issuance of age certificates; but on the other hand one wonders why the definite distinction between age certificates and employment certificates is made if the requirements for them are identical.

"Your opinion as to whether medical examination for children 16 years of age and over is a fixed requirement even though proof of age is available otherwise, will be greatly appreciated; and in case your opinion is in the affirmative, please advise the upper age limit to which this requirement applies."

Your inquiry involves an interpretation and construction of the provisions of Title 26, Sections 356 and 357, Code of Alabama 1940, as amended by Act No. 613, General Acts 1947, page 460. These statutes constitute a part of the law of this State relative to the employment of minors, and specifically deal with the certificates to be obtained by children of the ages therein mentioned as a prerequisite to engaging in employment.

Title 26, Section 356, *supra*, is applicable to children of the ages of fourteen and fifteen years, and provides as follows:

"§356. Application for certificates; how granted—The person authorized to issue employment certificates shall not issue any certificate unless the child, accompanied by his parent, guardian, or person standing in parental relation thereto, personally makes application to him, and until he receives, approves, and files the following papers duly executed: (1) a written statement of the person, firm, or corporation into whose service the child is to enter, to the effect that he intends to employ the child, which statement shall give the nature of the occupation for which the child is employed; (2) if the child is to work outside school hours on school days, a school record signed by the principal or teacher of the school attended by the child, to the effect that he is a regular attendant at school and is performing satisfactory school work; (3) one of the following evidences of age establishing the fact that the minor is of the legal minimum age for the job in which he is to be employed is required in the order designated; (a) a certified copy of the child's birth certificate, (b) a certified copy of the child's baptismal record showing the date of birth and place of baptism, (c) a bona fide contemporary Bible record of birth, (d) a life insurance policy which has been in force for at least one year, or (e) a passport or certificate of arrival in the United States which shows the age of the child; (f) if in any instance the officer authorized to issue such certificates is satisfied that none of the above proofs of age can be produced and the parent, guardian, or custodian shall make affidavit that none of the above proofs of age can be produced by him, other evidence of age, satisfactory to the person authorized to issue employment

certificates, as a school record of age if available and an affidavit of age sworn to by the parent, guardian, or custodian of such child, when accompanied by a certificate of physical age of such child, signed by a public health or public school physician; but a school record, or parent's, guardian's, or custodian's affidavit, certificate, or other written statement of age alone shall not be accepted; (4) a statement signed and dated by any county health officer or public school physician or other reputable physician showing that he has examined the child, and that in his opinion such child is of the legal minimum age for the job in which he is to be employed, of good physical development, in sound health, and physically and mentally able to perform the work he expects to perform. The Alabama state board of health shall promulgate uniform standards to determine physical age and physical fitness. In counties in which there are neither county health officers, nor public school physicians, the required examinations shall be made by regularly licensed physicians authorized in writing by the county board of health.

"The issuing officer is authorized to administer oaths for affidavits establishing age."

Title 26, Section 357, *supra*, is applicable, in part, to children sixteen years of age and older and provides in pertinent part, as follows:

"The officer issuing employment certificates is authorized to issue age certificates for children sixteen years of age and over in the same manner and upon the same requirements as for issuing employment certificates; the school record and personal appearance of parents being waived. * * *." (Emphasis supplied.)

You inquire as to whether the provisions of this latter statute require that children sixteen years of age and older, making application for the age certificate mentioned therein, furnish to the officer issuing such certificate the statement of the county health officer, public school physician or other reputable physician, as required by Subsection (4) of Section 356, *supra*. In my opinion, they must furnish such statement in order to obtain the age certificate.

Admittedly, the above-quoted statutes are subject to interpretation, but in my opinion, that portion of Section 357, *supra*, which provides that the officer issuing age certificates to children sixteen years of age and older shall issue such certificates "in the same manner and upon the same requirements as for issuing employment certificates; the school record and personal appearance of parents being waived," incorporates into such statute, by reference, all the requirements of Section 356, *supra*, applicable to employment certificates for children fourteen and fifteen years of age, other than those specifically waived. Had it been the intention and purpose of the Legislature to waive the requirement of physical examination for children sixteen years of age and older, it would have been a simple matter to have so stated that such requirement was waived, along with the school record and personal appearance of the

parents of such children. Failure to do so, in my opinion, is material and controlling upon the answer to your inquiry.

I am advised by the Child Labor Division of the Department of Industrial Relations that such has been the administrative construction placed upon such statute, both prior to and since the enactment of the amendatory act of 1947. While not controlling upon such question, the decisions of our courts are to the effect that the administrative construction of the laws by agencies created by law to administer them is to be given much weight, especially when long continued. *First National Bank of Birmingham v. Basham*, 238 Ala. 500, 191 So. 873; and in the case of *State ex rel. Fowler v. Stone*, 237 Ala. 78, 185 So. 404, it was held by the Supreme Court of Alabama that when there is doubt about the proper construction of a statute or constitutional provisions, contemporaneous construction placed thereon by the courts, by officers whose duty it was to construe them, and by the executive departments, and the popular interpretation as exemplified in practice for a number of years should be looked to in reaching a conclusion as to the proper construction to be given such statute. Many of the decisions of our courts testify to the correctness of the above rule of law.

It is, therefore, my opinion that those children sixteen years of age and older making application for an age certificate must present (1) statement of the prospective employer, (2) evidence of age as required by Section 356, *supra*, and (3) statement as to the physical examination, as likewise required by Section 356, *supra*.

Having answered your first inquiry in the affirmative, it is necessary that I give answer to your second inquiry, that is, the maximum age limit of children requiring physical examinations to obtain an age certificate. In my opinion, such requirement would apply to all children twenty years of age or less, inasmuch as the provisions of the Child Labor Law seek to regulate the employment of all minors, it being unlawful for any minor to engage in certain types of employment, while certain of the other statutes require that children be eighteen years of age or older before engaging in certain other types of employment. It being apparent that it is the purpose and intent of the provisions of the Child Labor Law to regulate the employment of all minors, it is my judgment that the requirement of a physical examination would be applicable to all children twenty years of age or less.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 7, 1948.

Hon. Ward W. McFarland, Director,
State Highway Department,
CAPITOL.

Trailers—Trucks—Motor vehicles—Highways and Highway
Departments.

Where vehicles hauling loads of poles, logs, lumber, structural steel, piping or timber exceed thirty-five feet in length, and where semi-trailer trucks hauling such loads exceed forty-five feet in length, such vehicles and semi-trailer trucks must obtain special permits in compliance with the provisions of Title 36, Section 91, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of August 4, 1948, is as follows:

"Sec. 94, Title 2, Chapter 3, Title 36, in the Regulation of Motor Vehicles on State Highways, poles, logs, lumber, structural steel piping and timber are exempt as to length.

"Under date of June 17, 1943, Sec. 89, Article 2, Title 36, of the 1940 Code of Alabama was amended establishing the length of motor vehicles on the State Highways for truck or tractor and semi-trailer at forty-five feet.

"I will thank you for your opinion as to whether or not the section exempting loads of poles, logs, lumber, structural steel, piping and timber would exempt the truck hauling such poles, logs, etc., when such truck and trailer exceeds the length of forty-five feet as fixed in the above named amendment, or whether it will be necessary to secure a special permit as provided for in Section 91, Article 2, Chapter 3, Title 36, for an overlength truck and trailer."

Title 36, Article 2, Section 89, Code of Alabama 1940, as amended by Act No. 179, General Acts 1943, page 159, approved June 17, 1943, in part provides:

"(c) LENGTH.—No vehicle shall exceed in length thirty-five feet except that the length of semi-trailer trucks, including any part of the body or load, shall not exceed forty-five feet. No vehicle operated on a highway shall carry any load extending more than two feet beyond the front thereof; . . ."

Title 36, Article 2, Section 94, Code of Alabama 1940, provides:

"There shall be exempt from the provisions of this article as to length loads of poles, logs, lumber, structural steel, piping and timber."

Title 36, Article 2, Section 9, Code of Alabama 1940, provides in part:

"The director of the highway department may issue special permits, without cost to the applicant therefor, in isolated cases only, for movement of oversize, overweight, or over length commodities, which can not be reasonably dismantled, and for the operation of such super-heavy or oversized motor trucks, or semi-trailers, whose gross weight, including loads whose height, width or length may exceed the limits prescribed in this article, or which in other respects fail to comply with the requirements of this chapter, as may be reasonably necessary for the transportation thereof;"

Thus, it is seen from Section 89, *supra*, as amended, that the maximum legal length of vehicles generally, operating over the highways of this State, is thirty-five feet and that the maximum legal length of semi-trailer trucks is forty-five feet, including any part of the body or load. However, by virtue of Section 94, *supra*, if such vehicle or such semi-trailer truck is hauling loads of "poles, logs, lumber, structural steel, piping and timber," the said length limitation as to load does not apply. Such loads legally may exceed the thirty-five and forty-five foot maxima, provided the end of the load be protected in the manner required by law. See Title 36, Section 77, Code of Alabama 1940.

The exemption of Section 94, *supra*, applies only to the length of loads, whereas Section 89, *supra*, as amended, definitely limits the length of vehicles generally to thirty-five feet and of semi-trailer trucks to forty-five feet. Therefore, in my judgment, where such vehicles exceed those maxima, they must operate under a special permit, provision for which is made by Section 91, *supra*, even though the load itself is of the class exempted by Section 94, *supra*.

In my opinion this conclusion does no violence to the purpose of Section 94, *supra*, which in my view protects only the load and not the vehicle. By confining the exemption to the load, the obvious legislative intent was to place an automatic limitation upon the length of such loads haulable without special permit, since in practical effect the length of the vehicle in some degree controls the length of the load.

Therefore, if the length of a vehicle hauling loads of poles, logs, lumber, structural steel, piping or timber exceeds thirty-five feet, or, in the case of semi-trailer trucks hauling such loads, if the length of such semi-trailer truck exceeds forty-five feet, in my judgment such vehicle and such semi-trailer truck must operate under the special permit for which provision is made by Section 91, *supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 8, 1948.

Hon. N. L. Boyd, President,
Etowah County Board of Revenue,
Gadsden, Alabama.

Counties—Eminent Domain—Claims—Limitation of Actions.

1. Where the diversion of water, occasioned by the construction of a county road, creates a physical disturbance of abutting land, the County is liable in damages to abutting land-owners. Constitution of Alabama 1901, Sections 23 and 235.

2. If a claim for such damages be presented within twelve months and no action is taken on the same for six years, such claim would be barred by the Statute of Limitations under Title 7, Section 21, Subdivision 5, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of June 16, 1948, is as follows:

"As President of the Board of Revenue of Etowah County, I hereby respectfully request your opinion on the following matter, to wit:

"Can the County Board of Revenue of Etowah County, Alabama pay damages to a property owner that were caused by the construction of a road through the owner's property causing water to overflow on his property? The property has since been voted into the city limits of Attalla, Alabama, but at the time of said construction work said property was not within the city limits of Attalla.

"The work done by the County that caused the above named damage was done more than twelve months ago and no written claim was filed with the Etowah County Board of Revenue for said damages, but an oral claim was made on the County immediately after said work was done."

The term, "other corporations," as used in the Constitution of Alabama 1901, Section 235, includes counties, so as to render them liable for damages to adjacent property. *Dallas County v. Dillard*, 156 Ala. 354, 47 So. 135; *Morgan County v. Standridge*, 235 Ala. 486, 179 So. 912.

In view of this section, a county is liable for property taken, injured, or destroyed in the construction or enlargement of its highways by its authority, under its direction or by its agents or servants acting within the line or scope of their employment, in an appropriate action and upon proper proof. *Warwick v. Mobile County*, 17 Ala. App. 206, 84 So. 396.

Thus, the Supreme Court in construing Section 235, *supra*, has held that a county is liable for just compensation to abutting landowners for injuries resulting from the diversion of waters upon their land due to the faulty construction of a culvert when the county improved the adjacent highway. *Morgan County v. Standridge*, *supra*.

In construing the Constitution of Alabama 1901, Section 23, the Supreme Court has said that the erection across a stream, in the course of a highway construction, of an embankment, diverting the waters and causing them partly to flood the plaintiff's land, constituted a "taking" of private property for the highway, rendering state highway officers liable for damage to the entire tract. *Finnell et al. v. Pitts*, 222 Ala. 290, 132 So. 2.

Your inquiry does not indicate whether this landowner's property has been subjected to seasonal flooding or has been permanently submerged. While affecting only the measure of damages, in the former event he could recover for consequential damage under Section 235, *supra*, and in the latter event he could recover under Section 23, *supra*. In either event it appears that, as a direct consequence of the improvement, there was a physical disturbance of his property, which excludes the case from the principle applied in *Hamilton, et al. v. Alabama Power Company*, 195 Ala. 438, 70 So. 737. Therefore, your question is answered in the affirmative, subject to the following qualifications:

You state that the property was damaged "more than twelve months ago" and that, while no written claim was filed, an oral claim was filed immediately after the work was done. Therefore, the requirements of Title 12, Section 118, Code of Alabama 1940, are satisfied. Proof of presentation may be made by parol evidence. Title 7, Section 96, Code of Alabama 1940. However, if the claim be presented within twelve months and no action is taken on the same for six years, such claim would be barred by the Statute of Limitations under Title 7, Section 21, Subdivision 5, Code of Alabama 1940. Biennial Report of Attorney General, 1934-1936, page 138. Therefore, if the claim was filed more than six years ago, it is now outlawed.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 8, 1948.

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
CAPITOL.

Counties—Health and Health Department.

The authority of a county governing body to expend funds of the county for the construction of storm water sewers (such

sewers not being constructed for the purpose of preventing damage to the public roads and bridges of the county) is contingent upon a request from the State Board of Health, pursuant to the provisions of Title 12, Section 12, Subsection 19, Code of Alabama 1940, which request can only be made by the State Board of Health if it finds that the construction of such sewers will promote or enforce the health and quarantine laws of the State for the benefit of the county and its inhabitants.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of August 20, 1948, is as follows:

"I attach hereto a copy of a letter dated August 20, 1948, which I have received from the Montgomery County Board of Revenue.

"I desire your official opinion as to whether or not the authority of the Montgomery County Board of Revenue to make the expenditure of approximately \$18,000, as contemplated by this letter, is contingent upon my requesting said Board to make such expenditure, because of either the provisions of Title 12, Section 12, Subsection 19, Code of Alabama 1940, or any other provision of law.

"Your early opinion on this matter will be greatly appreciated, to the end that I may make an immediate decision should you hold that the authority of the Montgomery County Board of Revenue to make this expenditure is contingent upon a request from me."

I deem it advisable to here set out the body of the letter which you received from the Montgomery County Board of Revenue:

"Plans and specifications have been prepared by J. M. Garrett and Sons, Civil Engineers, Montgomery, Alabama, and approved by O. L. Skinner, Engineer for the City of Montgomery, for extending a 60" storm water sewer lying between Madison Ave. and upper Wetumpka Road, in the City and County of Montgomery, Alabama. Such plans also provide for connecting other smaller drains (24" in diameter) with this large 60" drain, which smaller drains are now open. Large quantities of surface water are now collecting in a pool immediately south of the upper Wetumpka Road and it is our belief that it will be of considerable benefit to the general health of Montgomery County and its inhabitants if this condition is eliminated by the extension of this storm sewer. Such drain would be approximately 500' in length and would extend to the north side of the upper Wetumpka Road.

"It is our interpretation of the statutes (Title 12, Section 12, Sub-section 19, Code of Alabama 1940) that the Board of Revenue

is without authority to make appropriation for such purposes until requested so to do by the State Board of Health. Mr. Charles White, an Engineer associated with the State Board of Health, is familiar with the conditions which we are seeking to rectify. It is requested that you make an immediate study of this health problem, and if you agree with us that the condition should be rectified and that our proposal for correcting the condition seems to be a proper one, that you request the Montgomery County Board of Revenue to appropriate money for this purpose. It is estimated that the total cost of such work will be approximately \$18,000.00."

If the contemplated storm water sewers referred to in the above quoted letter were to be constructed to prevent damage to the public roads and bridges of Montgomery County, the county governing body would have the authority to make an expenditure for such purpose, pursuant to the broad powers vested in it by Title 23, Section 43, Code of Alabama 1940. However, there is nothing before me to indicate that such sewers are to be constructed for that purpose. If they are not to be constructed for that purpose, we must look elsewhere for authority of the county governing body to expend the funds of the county for this purpose.

A careful search of the statutes of this State dealing with county governing bodies does not disclose such authority unless it is found in Subsection 19, of Title 12, Section 12, Code of Alabama 1940 (the section which deals generally with the authority of county governing bodies), which reads as follows:

"To appropriate money to promote or enforce the health and quarantine laws of the state for the benefit of the county and its inhabitants, when requested so to do by the state board of health."

It is crystal clear from this statutory provision that the authority of a county governing body to appropriate money for the purposes there mentioned is contingent upon a request from the State Board of Health.

Consequently, I advise you that the authority of the County Governing Body of Montgomery County to expend funds of the county for the purpose of constructing storm water sewers, as contemplated in the above quoted letter from the Montgomery County Board of Revenue, is contingent upon a request from the State Board of Health.

However, this request may only be made by the State Board of Health if it finds that the construction of such storm sewers will "promote or enforce the health and quarantine laws of the state for the benefit of the county and its inhabitants." In this connection, I call your attention to the following quotation from Quarterly Report of Attorney General, Vol. 36, page 71:

"The public health laws of the State are exercised and enforced through the executive authority of the State Board of Health.

It has been said that agency's judgment as to whether or not a given expenditure of funds for public health was within the meaning of the term 'public health' is controlling in a dispute between the county and the agency. *Tuscaloosa County v. Walker*, 235 Ala. 293. This does not mean, however, that the State Department of Public Health can determine that any given condition relates to the public health if the condition does not reasonably relate to health in fact."

Cf. Quarterly Report of Attorney General, Vol. 1, page 104, and Quarterly Report of Attorney General, Vol. 46, page 75.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 8, 1948.

Hon. W. H. Haigler,
Secretary-Treasurer,
State Licensing Board for General Contractors,
Montgomery 5, Alabama.

State Licensing Board for General Contractors—Contractors—
Licenses.

A person who superintends a construction costing ten thousand dollars or more for a fixed commission, or salary, is a general contractor, and should qualify as such with the State Licensing Board for General Contractors.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of August 13, 1948, is as follows:

"The State Licensing Board for General Contractors respectfully requests your official opinion on the following matters:

"Is a person who superintends a construction costing \$10,000.00 or more, for a fixed commission or salary agreed upon with the person furnishing the materials and labor, a general contractor within the definition of that term contained in Title 46, Section 65, Code of Alabama 1940, and must this superintendent qualify with this Board?

"Would your answer be different if the superintendent was constructing a church building costing over \$10,000.00?"

In my opinion, your inquiry should be answered in the affirmative.

The person who superintends the construction, as outlined in your request, is a general contractor under the law, and should qualify with the State Licensing Board for General Contractors.

Title 46, Section 65, Code of Alabama 1940, provides as follows:

"§ 65. For the purpose of this chapter a 'general contractor' is defined to be one who, for a fixed price, commission, fee or wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading, or any improvement or structure where the cost of the undertaking is ten thousand dollars or more, and any one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements above mentioned, in the State of Alabama, costing ten thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the State of Alabama."

The fact that the person is superintending the construction of a church building costing over ten thousand dollars does not exempt him from having to qualify as a general contractor with the State Licensing Board.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 9, 1948.

Hon. J. M. McLeod,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Municipal Corporations—Elections—Candidates.

Act No. 465, General Acts 1945, page 699; Title 37, Section 403, Code of Alabama 1940; Section 178, Constitution of Alabama 1901.

Persons who are residents of a municipality, and properly qualified as electors under the provisions of Section 178, Constitution of Alabama 1901, may become candidates for municipal office even though their certificate of proof of payment of all poll tax due in another county of the State, in which such person formerly resided, is received less than thirty days prior to the date of the election.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of September 3, 1948, is as follows:

"We are having in Pineapple an election for councilmen and Mayor, and Mr. W. C. Watson, a candidate for councilman, fifty-eight years of age now, left Wilcox County and registered and paid poll tax in Morgan County until he became forty-five years of age. Mr. Watson moved back to Wilcox County about four or five years ago, and the registration book shows him registered. He failed to get his name placed on the poll tax list, in Wilcox County, until today, September 3, 1948.

"As I understand the law, you will have to qualify thirty days before election, which is September 20, 1948. Please advise me if Mr. Watson can qualify as a councilman under above facts."

In my opinion, your inquiry must be answered in the affirmative.

Title 37, Section 403, Code of Alabama 1940, prescribes the qualifications candidates for municipal office must possess, such statute providing as follows:

"§ 403. Every mayor, councilman and officer elected by the whole electorate of the city or town shall be a resident and qualified elector of the city or town in which he shall have been elected, and shall reside within the limits of the city or town during his term of office. The councilmen shall be qualified electors of said city or town, residing within the limits of the ward from which they shall have been elected, and shall reside within the limits of said ward during the term of his office."

Municipal elections in cities and towns, other than those having a commission form of government, are held in accordance with the provisions of Act No. 465, General Acts 1945, page 699, Section 5 of such act providing with reference to the statement of candidacy required of each candidate, as follows:

"Section 5. Any person desiring to become a candidate at any election which may be held according to the terms of this article may become such candidate by filing in the office of the mayor of the city, a statement of candidacy, accompanied by affidavit taken and certified by any officer authorized to take acknowledgments in this state, that such person is duly qualified to hold the office for which he desires to become a candidate. Such statement shall be filed at least thirty days before the date set for such election and shall be substantially in the following form:

'State of Alabama, _____ County. I, the undersigned, being first duly sworn, depose and say that I am a citizen of the City of

_____ in said state and county, and reside at _____
in said city; that I desire to become a candidate for the office of
_____ in said city for the term of _____ years at the elec-
tion for such office to be held on the _____ day of _____;
that I am duly qualified to hold said office if elected thereto and
I hereby request that my name be printed upon the official ballot
at said election. (Signed) _____
_____ on this _____ day of _____, 19 _____.

Style of Officer”

In short, the above statutes provide that candidates for municipal office must be residents and qualified electors of the city or town in which such office is sought, and that a statement to this effect, declaring their candidacy for office, must be filed with the mayor of such municipality thirty days prior to the election in which they desire to participate as a candidate.

As I understand your request, the candidate here concerned is over the age of forty-five years, and hence not subject to the payment of the poll tax. Furthermore, that such candidate, prior to and at the time of becoming forty-five years of age, resided in another county of the State wherein he paid all poll tax due. That at a time subsequent to becoming forty-five years of age, such candidate has returned to Wilcox County and has registered as an elector thereof. The only point in issue seems to be the fact that such candidate has only recently, upon September 3, 1948, furnished you with a certificate of proof from the Judge of Probate of the county of his former residence that he had paid all poll tax due in such county until reaching the age of forty-five years. Because of this fact, you inquire as to whether such candidate is qualified to participate in the general municipal elections of September 20, 1948 as a candidate for office.

In my opinion, he may, if the facts be that he is a resident and qualified elector of the town in which he seeks office. Section 178, Constitution of Alabama 1901, provides with reference to the qualifications of electors, in pertinent part, as follows:

“Sec. 178. To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; * * *”

It is, therefore, my opinion that if the person here concerned does, in fact, meet all the above requirements as to residency, registration and payment of poll tax, he may properly become a candidate for

municipal office in the municipal elections of September 20, 1948. The fact that you did not, until September 3, 1948, receive proof that such person had paid all poll tax due in another county does not alter such person's rights or privileges as an elector, if in fact he is duly qualified as such.

I am, therefore, of the opinion that such person, if qualified under the above provisions of Section 178, Constitution of Alabama 1901, is qualified to hold the office which he seeks and may properly become a candidate therefor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 10, 1948.

Hon. Ed E. Reid,
Executive Director,
Alabama League of Municipalities,
Montgomery, Alabama.

Municipal Corporations — Elections — Candidates — Corrupt Practices.

Title 17, Sections 274-275, Code of Alabama 1940.

1. Candidates for municipal office in election held in accordance with the provisions of Act No. 465, General Acts 1945, page 699, are not required to appoint a committee for the purpose of receiving, expending, auditing and disbursing the campaign funds of such candidates.

2. The provisions of Title 17, Section 275, Code of Alabama 1940, have no application to such candidates for municipal office.

3. The opinion of this office found set out in Biennial Report of Attorney General, 1928-30, page 924, in part overruled and withdrawn.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 20, 1948, is as follows:

"The question has arisen as to the applicability of the several provisions of the Corrupt Practices Statute to municipal elections held in accordance with the terms and provisions of the Andrews Act of 1945 (Act No. 465, Acts of 1945).

"It is the opinion of the Counsel of the Alabama League of Municipalities that the Court in its decision in the case of *Doughty v. Bryant*, 226 Ala. 23, took the position that the provisions of the Corrupt Practices Act were not to be applied to municipal elections, except as to the limit on campaign expenditures.

"One of our city attorneys wants to know specifically whether Section 275, Title 17, Code of 1940, has to be complied with, in view of the holding in the *Doughty v. Bryant* case, supra.

"Thanking you for your immediate attention to this request, as we have to prepare ballots after Saturday of this week."

In my opinion, your inquiry must be answered in the negative.

In order to give proper answer to your inquiry, it is necessary that Title 17, Section 274, Code of Alabama 1940, be considered in connection with the provisions of Title 17, Section 275, Code of Alabama 1940, the statute of which you make specific inquiry. These two statutes, which constitute a part of what is commonly known as the Corrupt Practices Act, provide as follows:

"§274. Any candidate shall, within five days after the announcement of his candidacy for any office, if the office be a state office, file with the secretary of state, and if the office be a county office, file with the judge of probate of said county, and if it be a district or circuit office, file with the judge of probate of each county which is embraced in said district or circuit, the name of not less than one nor more than five persons elected to receive, expend, audit and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such person to act as such committee, but any candidate may, if he sees fit to do so, declare himself as the person chosen for such purpose. Such committees shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidate may fill such vacancies, or the remaining members shall discharge and complete the duties required of said committee as if such a vacancy had not been created. No candidate for nomination or election shall expend any money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesaid."

"275. Any person who shall act as his own committee shall be governed by the provisions of this article relating to committees

designated by candidates. Failure to make the declaration of appointment or selection by any candidate as herein required is declared to be a corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election."

It is obvious from a reading of the above statutes that the committee referred to within Section 275, *supra*, is that committee provided for by Section 274, *supra*, composed of not less than one nor more than five persons elected to receive, expend, audit and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of candidates for the offices designated therein.

The Supreme Court of Alabama has twice held that the provisions of Section 274, *supra*, have no application to candidates for municipal office, and that such candidates are not required to designate or appoint the committee provided for therein. *Doughty v. Bryant*, 226 Ala. 23, 145 So. 420; *State ex rel Chambers v. Bates*, 233 Ala. 251, 171 So. 370.

The forerunner of the statute here concerned, Section 274, *supra*, was Section 588 of the Code of Alabama 1923, and in considering such statute in the case of *Doughty v. Bryant*, *supra*, the court stated as follows:

"We are clear to the conclusion that these averments do not sustain the equity of the bill, or authorize injunctive relief, for the following reasons: First, for all that appears in the bill, Kunz, whose election is not questioned, is entitled to take and hold the office now occupied by the complainant (*Casey v. Bryce*, *supra*); and, second, while section 586 of the Code of 1923 prescribes the amount candidates for municipal offices may expend in the aid of their candidacy, and section 587 declares 'the expenditure by any candidate for a public office of an amount in excess of the amounts herein specified shall disqualify said person for said office,' there is no provision in section 588, requiring candidates for municipal offices to file statements of their expenditures.

"Appellant's contention here is, that the provision, 'and if it be a district or circuit office, file with the judge of probate of each county which is embraced in said district or circuit,' applies to offices of municipal corporations. The statute is highly penal, and will be strictly construed. To construe the quoted clause as covering offices in municipal corporations would be a very liberal and loose construction."

It is, therefore, my opinion that inasmuch as Title 17, Section 274, *supra*, does not require candidates for municipal office to name the committee therein provided for, there is no field of operation for Title 17, Section 275, *supra*, with respect to candidates for municipal office, and that the provisions of this latter statute are not applicable to such candidates.

It is noted that your inquiry directs itself only to municipal elections held in accordance with Act No. 465, General Acts 1945, page 699. The provisions of such Act not being applicable to cities operating under a commission form of government, the holdings herein announced are restricted in their application to those municipalities operating other than under a commission form of government. Municipal elections in those cities operating under a commission form of government are to be held in accordance with the statutes applicable thereto, which statutes are not pertinent to your inquiry.

In my judgment, that portion of an opinion rendered by this office to the Mayor of the Town of Clanton, Chilton County, Alabama, under date of September 18, 1930, Biennial Report of Attorney General, 1928-30, page 924, to the effect that candidates for municipal office must file a statement of their campaign expenses in the office of the judge of probate of their county is in error and, accordingly, that portion of said opinion is hereby expressly overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 10, 1948.

Hon. A. R. Meadows,
State Superintendent of Education,
Department of Education,
CAPITOL.

Municipalities—City Boards of Education—Schools.

A teacher employed by the city board of education, whose salary is paid from funds administered by said board, may serve as a member of the city council.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of August 26, 1948, is as follows:

"Mr. C. L. Martin, Superintendent of the Sylacauga City Schools, has requested that I secure your opinion on the question 'Can a teacher employed by a city board of education at an annual salary of \$2,400 also serve as a member of the City Council at a salary of \$50 per month?'

"The facts as presented to me are that Mr. C. S. Crowther, who is employed as a regular teacher by the Sylacauga City Board of Education, has announced his candidacy for a member of the Council

of the City of Sylacauga. The election will be held September 20, 1948. Mr. Crowther receives an annual salary of \$2,400 payable in twelve installments from the Sylacauga City Board of Education. If elected, he will be paid \$50 per month as a member of the Sylacauga City Council. Your consideration of this question will be greatly appreciated."

Title 52, Section 158, Code of Alabama 1940, defining the authority of the city board of education, is as follows:

"§ 158. Authority of city board of education.—The city board of education is hereby vested with all the powers necessary or proper for the administration and management of the free public schools within such city and adjacent territory to the city which has been annexed as a part of the school district which includes a city having a city board of education."

In the case of *City Board of Education of Athens v. Williams*, 231 Ala. 137, 163 So. 802, the court held that school funds administered by the city board of education were state school funds. In this case, the court said:

"We also think that all contributions from individuals and public or private corporations (section 258, Constitution), including cities, to the public school funds in the state, partake of the same nature as other moneys donated to public school purposes, after they have been placed under the power and control of the agencies created by law to administer them as such public school funds. They all then become of the same sort, regardless of their original source.

* * * * *

"When the city makes an appropriation to school purposes (section 212, School Code; *White v. Mayor & Council of Decatur*, 119 Ala. 476 (3), 23 So. 999), and causes it to be set apart and held by its treasurer as treasurer of the school fund (section 196, School Code), it is no longer a part of the city funds, but at once becomes as other funds so in possession of the treasurer of the city board (section 212, *supra*). All such money is then held by it for the state system of schools, regardless of its source, to be expended directly for the benefit of those situated in that city."

See also *State, et al v. Williams*, 236 Ala. 272, 181 So. 792.

Title 37, Section 414, Code of Alabama 1940, provides in part as follows:

"§ 414. Aldermen, etc., not to be interested in municipal contracts or business thereof.—No alderman or officer or employee of the municipality shall be directly or indirectly interested in any work, business, or contract, the expense, price or consideration of which is paid from the treasury, * * * * *"

It will be seen from the above section that an alderman (councilman) of a municipality may not be directly or indirectly interested in any contract, the consideration of which is paid from the treasury of the municipality. However, in the situation presented by your inquiry, the salary of the teacher is being paid by the city board of education from funds administered by said board and not from funds in the treasury of the city. Therefore, the inhibitions in Section 414, supra, are not applicable to the question under consideration. For like reasons, the inhibitions of Title 37, Section 431 and 452, Code of Alabama 1940, are not applicable.

In view of the above conclusions, it is my opinion that a teacher employed by the city board of education, whose salary is paid from funds administered by said board, may serve as a member of the city council, my research having disclosed no constitutional or statutory inhibitions against his so serving.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 14, 1948.

Hon. M. M. Moulthrop,
Mayor, City of Eufaula,
Barbour County,
Eufaula, Alabama.

Municipal Corporations—Licenses.

Title 37, Sections 735-745-754, Code of Alabama 1940.

1. A municipal corporation may, by legally adopted ordinance, levy a license tax upon distributors of liquefied petroleum, known as propane gas, distributing such product within the corporate limits of the municipality, irrespective of whether such distributors have, or maintain, a fixed place of business within such municipality.

2. A person, firm or corporation, engaged in the manufacture, sale or distribution of propane gas, without grant of any public franchise or exercise of the right of eminent domain, is not a public utility within the meaning of the law, and the provisions of Title 37, Section 745, Code of Alabama 1940, as amended, are not applicable to such person, firm, or corporation.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of July 19, 1948, is as follows:

"The City of Eufaula levied a privilege or license tax of \$100.00 against distributors of liquefied petroleum gas, known as propane gas. The distributors doing business in the City paid this license without question. However, distributors not having a fixed place of business within the City, or within its police jurisdiction, but located in another municipality, have been delivering propane gas, or distributing the same in tubes or cylinders within this City, and in competition to local dealers, and refusing to pay the license of \$100.00.

"This concern insists it is only subject to two per cent of its gross receipts of its business transacted in this city during the preceding year as the tax or license due the City, and that H. B. 324, approved July 10th, 1935, is its authority.

"Will you please advise me, in an opinion, whether the City can impose this license of \$100.00 upon distributors not having a fixed place of business in the City, but doing business therein, or if the cited provision is applicable to all such businesses distributing such gas. Your attention will be gratefully appreciated."

In your request for opinion, you inquire as to the authority of a municipality to levy a license tax upon those persons, firms or corporations engaged in the business of distributing liquefied petroleum, known as propane gas, within the corporate limits of such municipality, with particular reference to the applicability of such license fee to all such persons, firms or corporations engaged in such business within the corporate limits of the municipality, whether having a fixed place of business therein or not.

In my opinion, a municipality is vested with the authority to require, by properly adopted ordinance, that all persons, firms or corporations engaging in such business within the corporate limits of the municipality pay the license fee levied by such ordinance, irrespective of whether such persons, firms or corporations have or maintain a fixed place of business within the municipality.

The power and authority of a municipality to license businesses, trades or occupations is found set out in Title 37, Section 735, Code of Alabama 1940, which statute provides as follows:

"All municipalities shall have the power to license any exhibition, trade, business, vocation, occupation, or profession not prohibited by the constitution or laws of the state, which may be engaged in or carried on in the city or town; to fix the amount of licenses, the time for which they are to run not exceeding one year, and provide a penalty for doing business without a license, and to charge a fee of not exceeding fifty cents for issuing such license; to require sworn statements as to the amount of capital invested, or value of goods or stocks, or amounts of sales or receipts where the amount of the license is made to depend upon the amount of capital invested, or

value of goods or stocks or amount of sales or receipts, and to punish any person or corporation for failure or refusal to furnish sworn statements or for giving of false statements in relation thereto. The license herein authorized as to persons, firms or corporations engaged in business in connection with interstate commerce, shall be confined to that portion within the limits of the state, and where such person, firm or corporation has an office or transacts business in the city or town imposing the license. The power to license conferred by this article may be used in the exercise of the police power as well as for the purpose of raising revenue, one or both."

Title 37, Section 754, Code of Alabama 1940, makes it unlawful for any person, firm or corporation, or agent thereof, to engage in any of the businesses or vocations in a city for which a license may be required without first having procured such license, and fixes a penalty for violation thereof.

The Supreme Court of Alabama, in the case of *Town of Guntersville v. Wright*, 223 Ala. 349, 135 So. 634, in an opinion by the now Chief Justice of such Court, considered a question peculiarly similar to that presented by your inquiry, even as to the amount of the license fee levied by the municipality, and the Court there stated:

"We gather from brief of counsel that the further reason upon which the trial court rested the conclusion that the ordinance was void was that it required a license fee of one who did not reside or have his place of business within the corporate limits or the police jurisdiction of said town. But, as has been pointed out in previous decisions, the tax is not a property tax, but a license tax on the occupation, and it is therefore immaterial that the property or place of business is without the corporate limits."

The above decision dealt with the question of the liability of a distributor of gasoline and oil products, whose place of business was located other than in the town of Guntersville, but who distributed such products within the corporate limits of the town of Guntersville, for the payment of the one hundred dollars license fee levied by the town upon such business. The Court concluded that Title 37, Section 735, *supra*, contained ample authority for the levy of such a license tax, and that the town was within its legal rights in the imposition of such license fee, inasmuch as the actual delivery and distribution of the gasoline is a most material part of the business conducted, and this was done within the municipality, citing the case of *Standard Oil Co. v. City of Selma*, 216 Ala. 108, 112 So. 532. A like conclusion was reached by the Supreme Court in the case of *City of Enterprise v. Fleming*, 240 Ala. 460, 199 So. 691, wherein the *Town of Guntersville* case, *supra*, is cited with approval.

Undoubtedly, the contention of certain of the distributors, mentioned by you in your inquiry, that they are only subject to a license tax not to exceed two percent of the gross receipts of such concerns in the municipality for the preceding year is founded upon a misinterpretation

of the provisions of Title 37, Section 745, Code of Alabama 1940, as amended by Act No. 355, General Acts 1947, page 238. Such statute provides that certain types of businesses, including gas and gas distributing companies, when engaged in business as public utilities, shall only be subject to a license tax of two percent of their gross receipts within the municipality for the preceding year.

The language and history of such statute, since its adoption within Act No. 328, General Acts 1919, page 282; its re-adoption within Act No. 194, General Acts 1935, page 256; its inclusion within the Code of Alabama 1923 as Section 2162 thereof, and its subsequent adoption and inclusion within the Code of Alabama 1940, with minor changes, as Title 37, Section 745 thereof, show unmistakably that such statute is applicable only to those businesses designated therein when operating as public utilities.

It may be conceded for the sake of argument that the business mentioned by you comes within the literal definition of a public utility as found in Title 48, Section 302, Code of Alabama 1940, as being a corporation or person "not engaged solely in interstate business that now or may hereafter own, operate, lease or control ° * * (4) any plant, property or facility for the manufacture, storage, distribution, sale, or furnishing to or for the public of natural or manufactured gas for light, heat, or power or other uses." The question is, however, not merely one of definition. The essential question is whether its business conducted in the manner above stated is within the meaning of the law affected with a public interest.

It does not appear that the company enjoys public franchises or engages in a business of a monopolistic nature or that in carrying on its business it is clothed with or exercises the power of eminent domain. For aught appearing, it is merely engaged in the sale and distribution of a commodity used for the purpose of generating heat, on the same footing that an ice company sells and distributes ice for purposes of refrigeration, or that an oil refiner may distribute fuel oil to its customers to heat their houses in the winter.

In my opinion, the decision of the Supreme Court of the United States, in the case of *New Ice Company v. Liebmann*, 285 U. S. 262, 76 L. Ed. 746, 52 S. Ct. 371, is conclusive to the effect that such business, or occupation, does not constitute a public utility within the meaning of the law.

In that case, it appears that the State of Alabama undertook by statute to declare the business of manufacture, sale and distribution of ice to be subject to regulation in such wise as to require a permit or license to be issued by a state commission before any person could engage in such business in a community already served by some other ice dealer or manufacturer. It was contended that such a business was affected with a public interest and, therefore, subject to regulation to the same extent as any public utility as the term is ordinarily understood is subject to regulation.

After discussing the grounds on which it had been held that the business of operating grist mills in times past and more recently the business of operating cotton gins are affected with a public interest and subject to regulation by state commission, the court, speaking through Mr. Justice Sutherland, on page 277, said:

"Here we are dealing with an ordinary business, not with a paramount industry upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See *Tyson & Bro. v. Banton*, supra, pp. 437-438, and cases cited."

Continuing, the court further states as follows:

"We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business and not the date when it began that is determinative. It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite the contrary. Nor is it a case of the protection of natural resources. There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject, of course, to reasonable regulations, prescribed for the protection of the public and applied with appropriate impartiality."

In this instance, therefore, I feel that the definition of a public utility, as above quoted from the Alabama statute, must be qualified with the proviso that the business therein defined as a utility must be of such nature and conducted under such circumstances as necessary to affect it with a public interest within the well understood meaning of that phrase. Quarterly Report of Attorney General, Volume 31, page 79.

It is, therefore, my opinion that the type of business or occupation mentioned by you within your request, that is, the sale and distribution of propane gas by individual distributors, does not constitute a public

utility within the meaning of the laws of this State. It is my further opinion that the provisions of Title 37, Section 745, as amended, supra, being applicable to the businesses designated therein only when conducted as public utilities, have no application to those distributors mentioned by you in your request, and the municipality may, by legally adopted ordinance, levy a license tax upon those distributors engaging in such business within the corporate limits of the municipality, whether such distributors have a fixed place of business therein or not.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 14, 1948

Hon. Frank Bunkley,
Administrator,
Alcoholic Beverage Control Board
C A P I T O L

Alabama Beverage Control Act—Appropriations—Funds—Intoxicating Liquors.

Expenses incurred incident to the enforcement of the Alcoholic Beverage Control Act and the prohibition laws are payable from the appropriation fund set up for the Law Enforcement Division of the Alcoholic Beverage Control Board.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of August 18, 1948, is as follows:

"Recently we received a request for the local authorities of Dallas County and also from citizens and licensees of the county asking that undercover men be sent into the territory to break up the unlawful sale of alcoholic beverages in and around Selma.

"Our Chief Law Enforcement Officer sent one of his investigators into that territory as an undercover agent who made purchases and cases against eighteen (18) violators in and around Selma. The cost in securing this evidence amounted to \$103.00.

"It is the opinion of the writer that the money expended to secure the evidence against these violators in Dallas County should be paid from the beer tax and license fund inasmuch as it was primarily done for the protection of licensees in that area.

"There has been a question raised by the Comptroller's Office as to whether or not this money could be paid from the beer tax and license fund since the agent turning in the expense account is paid from the appropriation funds set up for the Law Enforcement Division of the Alabama Alcoholic Beverage Control Board.

"We have received numerous requests from law enforcement agencies and licensees in several other counties for a similar service, and it will be appreciated very much if you will advise us as soon as possible if we have authority to use agents in the Enforcement Division to make the purchases and pay for the purchases from the Beer Tax and License Fund.

"We might add that as a rule the agent making the purchases will only be employed a short time, and after the cases have been made his usefulness in that area as undercover worker is over, as he is so well known that he could not possibly make a purchase."

Act No. 320, Section XXI(2), General Acts 1947, page 202, approved August 15, 1947, reads, in part, as follows:

"(2) For salaries and expenses incident to the operation of the Beverage enforcement Division of the Department of Public Safety \$300,000.00 or so much thereof as may be necessary from the proceeds of the Alcoholic Beverage Control Stores Funds; and provided that the expenditures from this appropriation shall be limited to the enforcement of the Alcoholic Beverage Control Laws and the rules and regulations of the Alcoholic Beverage Control Board and for no other purpose."

Although the Law Enforcement Division of the Alcoholic Beverage Control Board has, since the passage of the above cited act, been separated from the Department of Public Safety, that part of said act appropriating \$300,000.00 for the Beverage Enforcement Division is still effective.

It is my opinion that the salaries and expenses incident to the operation of the Beverage Enforcement Division must be charged to the aforesaid \$300,000.00, which is taken from the proceeds of the Alcoholic Beverage Control Stores Fund, and cannot, as is suggested in your inquiry, be charged to the beer tax and license fund.

I have considered the statutes dealing with taxes on beer and licenses on various distributors of alcoholic beverages and the appropriation of funds derived therefrom, and I find no authority for using the same in the manner suggested in your inquiry.

Be that as it may, however, assuming that the converse were true and that such statutes did authorize the expenditure of said funds, as suggested in your inquiry, the General Appropriation Act, supra, would suspend the operation of said statutes during the life of said act. See the cases of *Riggs v. Brewer*, 64 Ala. 282, *Owen v. Beale*, 145 Ala. 108, 39 So. 907.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1948

Honorable M. C. Sivley,
Register, Circuit Court,
Etowah County,
Gadsden, Alabama

Intoxicating Liquors—Costs and Fees—Municipalities.

The disposition of the proceeds derived from the sale of an automobile condemned for transporting prohibited liquors is governed by Title 29, Section 253, Code of Alabama 1940, when the arrest and seizure of such property is made by an officer or an employee of any municipality of this State.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 11, 1948, is as follows:

"I shall gratefully appreciate your official opinion on the question herein submitted.

"FACTS: An automobile engaged in illegal transportation of liquor was seized in the City of Gadsden by four policemen of said City who also furnished the proof in the condemnation proceeding. In said condemnation proceeding the car was ordered to be sold and the money distributed as provided by statutes of Alabama. Upon seizure by the policemen the car was turned over to the Sheriff who still has it for sale under the decree.

"QUESTION: What is the distribution of said money under Alabama statutes?

"I am unable to reconcile Act 126 approved July 17th, 1947, amending Section 251, Title 29 of the 1940 Code of Alabama, and Section 253 of said Title."

In answer to your inquiry, it is my opinion that the disposition of the net proceeds of the sale (after costs and expenses have been paid) should be as follows:

1. One-fourth to the officers making the seizure and furnishing the proof in accordance with Title 29, Section 251, Code of Alabama 1940, as amended by Act No. 126, General Acts 1947, page 38.
2. One-half of the remainder to City of Gadsden and the other half of the remainder to the Law Enforcement Fund in the State Treasury in accordance with Title 29, Section 253, Code of Alabama 1940.

Title 29, Section 251, as amended, *supra*, reads as follows:

"The proceeds of the sale of any property forfeited to the State, whether sold by court decree or by an officer under advertisement, shall, after paying all expenses in the cause, and of advertisement, as the case may be, including the costs of seizure and of keeping the property pending the proceedings, be applied as follows: one-fourth of the amount shall be paid to the officer making the seizure and furnishing the proof, but, if proof be furnished by a person other than the officer making the seizure, one-eighth of the proceeds shall go to the furnisher of the proof and one-eighth shall go to the officer making the seizure and assisting in the condemnation case or who makes the sale under advertisement; one-half shall be paid into the general fund of the county in which the property is seized; and one-fourth shall be paid into the treasury of the State as a law enforcement fund to be used and applied for the enforcement of State laws under the supervision and control of the Governor."

The above quoted provision governs the distribution of the proceeds of the sale of property forfeited to the State as contraband under our prohibited liquor statutes in general. It first provides for the payment of the costs and expenses of the seizure, and then provides for the distribution of the net proceeds, including the fees of the officers making the seizure and furnishing the proof.

Title 29, Section 253, *supra*, provides as follows:

"§253. Procedure by bill equity to forfeit contraband property; distribution of funds or proceeds of sale.—In cases of all contraband property, as provided in this article, there shall be a remedy by bill filed in the name of the state by the officer or other person in accordance with any provisions of the prohibition laws of the state, to secure a decree, sale and distribution of the proceeds in accordance with the provisions of this article. If the arrest and seizure of such property is made by an officer or employee of any municipality of this state, such municipality shall receive one-half of the remainder of the proceeds derived from the sale of such property, after the costs and expenses (including payment to officers and informers hereinabove provided for) are paid. The said portion of the moneys derived from such proceeds shall be paid into the treasury of such municipality, and used and applied as a law enforcement fund, under the supervision and control of the governing body of such municipality, and the remaining half shall be paid to the law enforcement fund in the state treasury."

This section recognizes the costs and expenses of the seizure and the officers' fees, as heretofore noted. It further deals specifically with the distribution of the remainder of the net proceeds when the arrest and seizure is made by an officer or employee of any municipality of this State.

Title 29, Section 251, as amended, *supra*, and Title 29, Section 253, *supra*, may be construed in *pari materia* in regard to costs and expenses of the seizure and the officers' fees. In these respects, there is no deviation in the two statutes. In regard to the distribution of the remainder of the net proceeds, the former governs generally, while the latter controls in a specific situation as in the instant case. Special statutory provisions relating to specific subjects control statutory provisions relating to general subjects, and the matters specifically treated will be considered as exceptions to the general provisions.—*Miller v. State, ex rel Peek*, 249 Ala. 14, 29 So. 2d. 411; *Herring v. Griffin*, 211 Ala. 225, 100 So. 202.

The premises considered, it is my opinion that the costs and expenses of the seizure are first to be paid out of the proceeds of the sale, then the officers' fees, which is one-fourth of the net proceeds, are paid to the officers making the seizure, in accordance with Title 29, Section 251, as amended, *supra*, and the remainder of the net proceeds (after the payment of the officers' fees) is payable one-half to the City of Gadsden and one-half to the Law Enforcement Fund in the General Treasury. in accordance with Title 29, Section 253, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1948

Hon. Frank Bunkley,
Administrator,
State of Alabama,
Alcoholic Beverage Control Board.
C A P I T O L

Intoxicating Liquors—Beer—Alabama Alcoholic Beverage
Control Act—Prohibition.

Malt beverages, such as "Bevo," "Amber-Bru," so-called "near beer" and other drinks resembling alcoholic beverages, though containing less than one-half of one per cent of alcohol, cannot legally be sold in Alabama, in either "wet" or "dry" counties.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of August 15, 1948, is as follows:

"We have received an inquiry from a wholesale distributor located in a 'wet' county who desires to know whether or not a malt beverage containing less than $\frac{1}{2}$ of 1% alcohol by volume is tax free

inasmuch as Section 1, Paragraph (i) Code of Alabama 1940 only applies to beverages of more than $\frac{1}{2}$ of 1% alcohol by volume.

"On January 2, 1942, the Attorney General's office rendered an opinion to Honorable Jeff D. Smith, Circuit Solicitor, Madison County, Huntsville, Alabama, to the effect that the old cereal beverage law had been repealed inasmuch as it had been omitted from the Code of Alabama 1940 so by this omission it would be a violation of the law for this beverage to be sold in a 'dry' county.

"It will be appreciated if you will advise us as soon as possible whether or not malt beverages of less than $\frac{1}{2}$ of 1% alcohol by volume can be sold in 'wet' counties of this State and, if so, whether or not the Alabama Alcoholic Beverage Control Board has any control over the sale, etc."

The so-called "Cereal Beverage Control Law" is found in Act No. 54, General Acts 1932, page 56. That law legalized the manufacture and sale, in Alabama, of so-called "near beer" containing not more than one-half of one per cent of alcohol. The Act was passed over the Governor's veto and, by virtue of the provisions of the Constitution of Alabama 1901, Section 125, became law on October 6, 1932.

The Code of Alabama 1940 became effective on May 31, 1941, on the 30th day after the date of the Governor's proclamation announcing its publication. Act No. 54, supra, was in its entirety omitted from the Code of Alabama 1940. While it is not my proper function to search for the reason for the omission, well may we speculate that the Code Committee of 1940 concluded that Act No. 54, supra, had been superseded by enactment of the so-called "Alabama Alcoholic Beverage Control Act." codified under Title 29, Sections 1-78, Code of Alabama 1940. Reasons for the omission aside, however, it is the fact of the omission which is important, and I have previously held that the omission operated as a repeal of Act No. 54, supra. See Quarterly Report of Attorney General, Vol. 26, page 5. Therefore, as of May 31, 1941, the sale of so-called "near beer" ceased to be legal in Alabama. The license tax formerly imposed by Title 51, Section 476, Code of Alabama 1940, on the manufacture and distribution of "near beer" was repealed by Act No. 504, General Acts 1945, page 729, approved July 6, 1945.

That conclusion follows from the decision of the Alabama Court of Appeals in *Lovett v. State*, 30 Ala. App. 334, 6 So. 2d 437 (certiorari denied: 242 Ala. 356, 6 So. 2d 441). There Judge Simpson (since elevated to the Supreme Court of Alabama) pointed out that those sections of the prohibition law not repealed and which can still have a field of operation in wet counties, consistent with the Alabama Alcoholic Beverage Control Act, are still effective. That is to say, the so-called "Weakley Bone Dry Law of 1919" remains in full force and effect, within its legitimate field, throughout the state, in both "wet" and "dry" counties. *Lovett v. State*, supra; *Tillison v. State*, 32 Ala. App. 397, 27 So. 2d 41 (certiorari denied: 248 Ala. 196, 27 So. 2d 46).

In defining "prohibited liquors and beverages" Title 29, Section 93, Code of Alabama 1940, provides that;

"The term 'prohibited liquors and beverages' shall include and be deemed to embrace the following: Alcohol, alcoholic liquors, spirituous liquors, and all mixed liquors any part of which is spirituous; foreign or domestic spirits, or rectified or distilled spirits, absinthe, whiskey, brandy, rum and gin; vinous liquors and beverages; malt, fermented or brewed liquors of any name or description manufactured from malt wholly or in part, or from any substitute therefor; beer, lager beer, porter and ale; and other brewed or fermented liquors and beverages by whatever name called; hop-jack, hop-ale, hop-weiss, hop-tea, malt tonic, or any other beverage which is the production of maltose or glucose, or in which maltose or glucose is a substantial ingredient; any intoxicating bitters or beverages by whatever name called; but this section shall not apply to the possession of wine or cordial made from grapes or other fruit, when the grapes or other fruit are grown by the person making the same for his own domestic use, upon his own premises in this state, and when such person keeps such wine or cordial for his own domestic use on his own premises in any quantity not exceeding five gallons for one family in twelve months; all liquors, liquids, drinks or beverages, made in imitation of or intended as a substitute for beer, ale, rum, gin, whiskey, or for any other alcoholic, spirituous, vinous or malt liquor; and any liquor or liquid made or used for beverage purposes containing any alcohol shall be deemed an alcoholic liquor, within the meaning of the term 'prohibited liquors and beverages,' as defined in this article in connection with the existing laws of Alabama."

Title 29, Section 1, Subparagraph (i), Code of Alabama 1940, in defining "malt" or "brewed beverages" within the meaning of the Alabama Alcoholic Beverage Control Act, provides that:

"'Malt' or 'Brewed Beverages,' means any beer, lager beer, ale, porter, or similar fermented malt liquor containing one-half of one percentum or more of alcohol by volume, by whatever name the same may be called."

From the statutory definition of "prohibited liquors and beverages" as expressed in Section 93, *supra*, it will be noted that, in common parlance, if the beverage "looks like, tastes like, smells like, or foams like beer," it is contraband under the "Bone Dry Law." In such case the beverage is contraband even though containing no alcohol whatsoever. Although soft drinks containing a mere trace of alcohol, for the purpose of cutting the oil in the flavoring extract, do not fall under the ban of those laws, yet beverages similar to "Bevo," "Amber-Bru," so-called "near beer," and other drinks resembling alcoholic beverages are outlawed. See Biennial Report of Attorney General 1919-1920, pages 118, 120, and 133.

Your inquiry is so phrased that an answer must be predicated upon the assumption that the malt beverage in question contains an undeter-

mined quantity of alcohol, but not more than one-half of one percent by volume. Under that assumed fact, I am of the opinion that such a beverage, or so-called "near beer," to-day cannot legally be sold in the State of Alabama, in either "wet" or "dry" counties, since in this state "near beer" is not recognized by existing temperance laws and met its legal death when our present Code of Laws was adopted. That conclusion being reached, the second phase of your inquiry requires no answer.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1948

Hon. Pat Byrne,
Commissioner of Licenses,
Mobile County,
Courthouse,
Mobile 1, Alabama

Taxation—License.

Act No. 688, General Acts 1947, page 522.

1. Act No. 688, General Acts 1947, page 522, imposes a license tax upon coin-operated machines vending any of the articles or merchandise enumerated therein, including music, and also upon those systems of dispensing music by wire or cable transmission, other than through coin-operated devices.

2. The license tax imposed upon the transmission of such music is levied upon the location, establishment, or place of business receiving such music, and the amount of such license tax is fixed by the number of speakers or transmitters located therein.

3. The purpose for which such music is received or the use made thereof by the purchaser is immaterial to the levy of the tax.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of July 28, 1948, is as follows:

"Your opinion is requested regarding the interpretation to be placed upon a phase of General Act No. 688, approved October 7, 1947, page 522 of the General Acts Alabama 1947.

"Question has arisen as to whether subject act is intended to apply to any apparatus or system for the transportation of music other than apparatuses or systems operated by means of insertion of coins.

"The Gulf Coast Wired Music Company, a relatively new Mobile enterprise, holds a franchise of the Muzak Corporation. The Muzak system does not involve the use of mechanical vending machines or coins at any point. The system consists of a central studio where all music originates and a wire or cable distribution net feeding various music-consumer outlets. This music service is sold to customers such as banks, stores, office buildings, physicians' and dentists' offices, restaurants, cafeterias, and the like, the customer paying a fixed, stipulated monthly or quarterly fee. The system does not entail selection of musical numbers by, for example, the individual customer of a restaurant outlet, nor do such individuals, themselves, pay for any music. It has been called to the writer's attention that this Muzak system is used by at least one physician as an incident of therapeutical treatment. It is further called to the writer's attention that one wired outlet is installed in the radio repair shop which services and maintains the system for Gulf Coast Wired Music Company, this outlet being for test and check purposes.

"The portion of subject act which has created the current controversy reads as follows:

"For each coin-operated machine on which music is played, and each location, establishment, or place of business receiving much (sic) transmitted by wire or cable from any central point or studio"

"Some systems are so set up that the outlet locations are equipped with multiple coin drops, and central studio playing equipment transmits by wire the musical numbers selected when customers of the outlet location deposit coins in the drops. The most common variety of commercial music-playing apparatus, of course, is what is known as the juke box.

"You will note, in the above quoted portion of subject act, an obviously misspelled word, 'much.' The questions to be determined are as follows:

- "1. Is the word 'much' supposed to be 'such' or 'music'?
- "2. If it is 'such,' does it refer to the word 'music' in the clause, each coin-operated machine on which music is played'?
- "3. If it is 'music,' is the clause in which that word occurs intended to cover systems not involving coin-operated apparatuses, such as the Muzak system described above?

"4. Is the Muzak system described a 'vending machine' within the meaning of the subject act requiring licenses for such machines?

"5. Is it the general intent of the act to impose licenses only on coin operated machines or systems, or is the intent of the act to go beyond that field and cover systems not involving coin-operated apparatuses?

"6. If the subject act is interpreted as applying generally to systems such as the Muzak system described, should license be collected on a physician's office location where music is utilized essentially for therapeutical and not for entertainment purposes? Or on the above mentioned test-check outlet location?

"7. If subject act is interpreted as applying generally to systems such as the Muzak system described, should general distinction be made, in its practical application, between locations where the music is received essentially for entertainment of patrons and locations where it is received essentially for the medical or psychological well-being of patients and employees and, if so, what criteria or circumstances shall govern such distinctions?"

Your inquiry involves a consideration and interpretation of the provisions of Act No. 688, General Acts 1947, page 522, which act amends Title 51, Section 613, Code of Alabama 1940. The portion of such act pertinent to your inquiry provides as follows:

"Section 1. That Section 613, Title 51, Code of Alabama 1940, as amended by an Act entitled an Act to amend Section 613, Title 51, Code of Alabama 1940, Act No. 207, General Acts Regular Session 1943, approved June 22, 1943, page 185, be and the same is hereby amended to read as follows: For each machine for vending gum, candy, soft drinks, ice cream, coffee, pop corn, food of any kind, drink of any kind, pencils, handkerchiefs, combs, drinking cups, cigarettes or other tobacco products, or other articles or merchandise, and for each machine for use in testing strength or grip, shining shoes, making or developing photographs, recording the voice or other sound, and each coin-operated radio, and each coin-operated machine by which a person is weighed, and each coin-operated machine for use in entertainment or skill, and each coin-operated machine on which music is played, and each location, establishment, or place of business receiving much transmitted by wire or cable from any central point or studio whether such point or studio is situated within or without such location, establishment, or place of business; \$1.00 for each machine that may be operated by pennies; \$8.00 for each machine that may be operated by nickels or coins of a larger denomination; and a separate license shall be issued for each such machine that may be operated by pennies, nickels, or coins of a larger denomination, which license shall be prominently displayed on or immediately near to such machine; except that hotels, motels, tourist camps, or other

places of business having less than five (5) coin-operated radios, \$8.00; and for each such radio in excess of four (4) \$2.00 each; \$8.00 for each location, establishment, or place of business receiving transmitted music by wire or cable, except that such locations, establishments, or place of business having less than five (5) transmitters or speakers \$8.00 and for each such transmitter or speaker in excess of four (4) \$2.00 each; provided that one license may be issued to include all coin-operated radios and/or transmitters or speakers located within such hotel, motel, tourist camp, location, establishment, or other place of business, which license shall be prominently displayed. The licenses herein provided for shall be levied upon the operator of the machine, the coin-operated radio, or the central point or studio from which point or studio the music is transmitted; provided, however, that in the event any unlicensed machine, coin-operated radio, transmitter or speaker is found in any establishment or place of business, the operator of such establishment or place of business shall be conclusively presumed to be the operator of such machine, coin-operated radio, transmitter or speaker and shall be liable for the license therefor.
* * * " (Emphasis supplied)

Construing the portion of such act, as above set out, it is my opinion that therein the Legislature has established and imposed a system of license fees not only upon coin-operated machines vending the articles therein enumerated, including music vending machines, but also upon each location, establishment, or place of business receiving music* transmitted by wire or cable from any central point or studio whether such point or studio is situated within or without such location, establishment, or place of business." This latter provision, in my judgment, includes within its meaning those systems of dispensing music other than through coin-operated devices, and describes in exact and precise language the identical system mentioned by you in your request.

It is to be noted that the Legislature in this same act, Act No. 688, supra, sets out the basis upon which such license tax shall be levied, providing that the amount of tax due is to be determined by the number of transmitters or speakers located within any establishment or place of business, and further provides as to who shall be liable for the payment of such license fee.

In your request, you call my attention to an obviously misspelled word found within the above act. The word, as set out within the act, is "much" and, as stated by you, obviously should be "music" or "such."

I have examined the above act as originally introduced in the House of Representatives of the State Legislature and I find that the word as there used was the word "music." Likewise within such act, as recorded by the enrolling and engrossing clerk, the word "music" is properly used. It is apparent that the typographical error arose either in the transmission or printing of such act and that the word of which you inquire is, and properly should be considered to be, the word "music."

In setting out the above, I have given answer to your first inquiry and because of the answer so given, your second inquiry becomes inapplicable. I have likewise previously given answer herein to your third inquiry to the effect that, in my opinion, the Legislature, by the passage of this act, has imposed a license tax upon those systems of dispensing music other than through coin-operated devices.

Answer to your fourth inquiry is not essential to this opinion, and, in my judgment, answer to your fifth inquiry is found in the holding herein to the effect that by Act No. 688, *supra*, the Legislature has imposed a license tax not only upon coin-operated machines vending the articles or merchandise therein enumerated, including music, but also upon those systems of dispensing music other than through coin-operated devices.

In answer to your sixth and seventh inquiries, I would point out that there is nothing within Act No. 688, *supra*, drawing any distinction or providing any exemption from the payment of the license fee here considered, based upon the use made or the purpose for which such transmitted music is received by its purchasers. It is my opinion, that the tax, as levied, is levied upon the location, establishment, or place of business receiving such transmitted music, the amount of such tax to be based upon the number of transmitters or speakers located therein. It is, therefore, my opinion that the purpose for which such music is purchased or the use made thereof by the purchaser, whether for entertainment or business purposes, is immaterial to the question here considered.

It is a well established principle of law, oftentimes announced by the Supreme Court of the State, that exemptions from taxation, whether statutory or constitutional, are to be strictly construed against the exemption and in favor of the right to tax, and no person or property is to be exempted unless the intention to exempt clearly appears. *State v. Elba Bank and Trust Co.*, 18 Ala. App. 253, 91 So. 917; cert. den. *Ex Parte Elba Bank and Trust Co.*, 207 Ala. 711, 91 So. 922; *Board of Education of Jefferson County v. State*, 239 Ala. 276, 194 So. 881; *Curry v. Reeves*, 240 Ala. 14, 195 So. 428.

Such being true, it is my opinion, that each of the locations establishments, or places of business mentioned by you in your sixth and seventh inquiries, wherein speakers or transmitters are located, are liable for the subject tax.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 15, 1948

Hon. Ira S. Crowe,
Register,
Circuit Court in Equity,
Chilton County,
Clanton, Alabama.

Offices—Terms of—Register in Chancery—Notary Public Ex
Officio Justice of the Peace.

Section 280, Constitution of Alabama 1901; Title 41, Section
5, Subsection 7, Code of Alabama 1940.

1. Both the offices of Register in Chancery and Notary Public
Ex Officio Justice of the Peace are offices of profit within the
meaning of the Constitution and statutes of the State, and a per-
son may not lawfully hold both of such offices at one and the
same time.

2. The acceptance, qualification and entering upon the duties
of a second office of profit vacates the former office held, and a
person continuing to fill both offices holds the former as a de facto
officer only.

3. Opinion of the Attorney General reported in Biennial Re-
port of Attorney General, 1934-36, page 240, modified so as to
conform with opinion announced herein.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 14, 1948, is as
follows:

"In the month of January, 1947, I was appointed Register of the
Circuit Court of Chilton County, Alabama, and in the same month or
early in February following I was appointed Notary Public Ex officio
Justice of Peace, in Beat 4, Chilton County, Alabama, and since said
appointments I have been serving as such in each place.

"I have been advised by people in recent weeks, whom I believe
to be highly informed, that I am serving in an illegal capacity in one
place or the other, I am therefore, asking that you give me an official
ruling in the matter, as I should like to make an official resignation in
the N. P. ExOff, J. P. appointment.

"I feel that it would be to the interest of the entire of Chilton
County, Alabama, to have this ruling as there has been others who

served in the same manner that I am now serving, and we should all be glad to have your opinion."

In your request, you inform me that you are presently serving as Register in Chancery for the Circuit Court of Chilton County, Alabama, and likewise serving as a Notary Public Ex Officio Justice of the Peace for Beat 4, Chilton County, Alabama. You inquire as to whether you may lawfully hold both of such offices at one and the same time. In my opinion, you may not.

Although Section 280, Constitution of Alabama 1901, which section prohibits any person other than those specifically designated therein from holding two offices of profit at one and the same time, except from such prohibition the offices of justice of the peace and notary public, such is not true of Title 41, Section 5, Code of Alabama 1940. Subsection 7 of this statute provides as follows:

"No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time under this state except notaries public."

It is to be observed that this statute excepts from its prohibitory provision only the office of Notary Public and therefore the provision of this statute is tantamount to a direct prohibition against any officer other than Notaries Public holding two offices of profit at one and the same time. The Constitution of this State is only a limitation upon the power of the Legislature to enact laws. Unless that power is restricted by the Constitution, the Legislature may enact such laws as it sees fit. The Constitution does not by Section 280 prohibit a further restriction, by the Legislature, of the qualifications of officeholders. Biennial Report of Attorney General, 1926-28, page 461.

The Supreme Court of Alabama has had occasion to define the requisites of an "office of profit" within the meaning and scope of Section 280, supra, having held in the case of *State ex rel. Glenn. v. Wilkinson*, 220 Ala. 172, 124 So. 211, as follows:

"On further, and more mature consideration, we are of opinion and so hold, that any State, county, and municipal office, whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the State, the term and salary or prerequisites of which are fixed by law, is an office of profit within the purview and meaning of section 280 of the Constitution of 1901."

In the light of this opinion of the Supreme Court, it is my opinion that the office of Register in Chancery of any of the Circuit Courts of the State constitutes an "office of profit" and falls within the scope of the prohibition of Section 280, supra, relative to the holding of two offices

of profit at one and the same time. Biennial Report of Attorney General, 1934-36, page 240.

The other office which you are now holding, or in which you are serving, you inform me, is the office of Notary Public Ex Officio Justice of the Peace for Beat No. 4, Chilton County, Alabama. Such officers are appointed by the Governor pursuant to the provisions of Title 40, Section 15, Code of Alabama 1940, and hold office for a definite term, as prescribed therein. With reference to the removal of such officers prior to the expiration of their term of office, I call your attention to Quarterly Report of Attorney General, Vol. 43, page 186. It is, therefore, my opinion that this office likewise constitutes an "office of profit" within the meaning of such term as used within the Constitution and statutes of this State.

The question, therefore, devolves into a question as to whether the latter office falls within the exception granted to Notaries Public within Title 41, Section 5, Subsection 7, supra. In my opinion, it does not. One holding office as a Notary Public Ex Officio Justice of the Peace is something more than a mere Notary Public. Such an officer is vested with all the powers and jurisdiction of a Justice of the Peace within the precinct or ward of his appointment and is subject to all the liabilities and penalties applicable to Justices of the Peace. It is, therefore, my opinion that the office of Notary Public Ex Officio Justice of the Peace does not fall within the exception granted Notaries Public within Title 41, Section 5, Subsection 7, supra, and that you are, therefore, at present purportedly holding two offices of profit in violation of such statute.

In your request, you inform me that you were first appointed as Register in Chancery for the Circuit Court of Chilton County and at a later date were appointed as Notary Public Ex Officio Justice of the Peace for a certain precinct of Chilton County. In my opinion, your acceptance, qualification and entering upon the duties of this second office served to vacate the office formerly held by you and that since such date, as regards the former office, you have served as a de facto officer only as distinguished from an officer de jure, the distinction being that the former has only color of an appointment or election to an office, while the latter is legally appointed or elected and qualified to exercise the office, and has a complete legal title to the office as against the world. So far as the public and third persons are concerned, there is no difference between an officer de facto and an officer de jure, the official acts of one being as valid and binding as those of the other. 46 C. J., Officers, Section 366; Quarterly Report of Attorney General, Volume 47, page 174.

From your inquiry, I gather that if it be held that the two offices you now fill are incompatible offices, you wish to relinquish the office of Notary Public Ex Officio Justice of the Peace and retain the office of Register in Chancery. In order to do so, it is my opinion that you must resign as Notary Public Ex Officio Justice of the Peace and be re-appointed as Register in Chancery, inasmuch as you have previously vacated this latter office by your acceptance, qualification and entering upon

the duties of the office of Notary Public Ex Officio Justice of the Peace. *Mann v. Darden et al*, 171 Ala. 142, 54 So. 504; *State ex rel. Camp v. Herzberg*, 224 Ala. 636, 141 So. 553.

In Biennial Report of Attorney General, 1934-36, page 240, it was held by this office that one may hold the offices of Justice of the Peace and Register in Chancery at one and the same time. This opinion obviously fails to consider the provisions of Title 41, Section 5, Subsection 7, *supra*, and for that reason, in my judgment, is in error. Accordingly, the holding therein is modified so as to conform to the opinion herein announced.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1948

Hon. A. R. Meadows,
Superintendent,
Department of Education,
State of Alabama,
C A P I T O L.

County Boards of Education—Courts of County Commissioners—Funds.

Title 52, Section 130, Code of Alabama 1940.

A county board of education is not authorized to purchase, from public school funds, items of office equipment for use in the office, or offices, of the county superintendent of education or his assistants, it being required by law that all such purchases be made with the approval of the county governing body and payment therefor made from funds of the county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 5, 1948, is as follows:

"The Tuscaloosa County Board of Education is faced with the necessity of employing additional clerical assistants or installing machines and equipment necessary to place in operation a machine accounting plan. A study of the situation by competent personnel in-

dictated the desirability of installing the machine accounting equipment, and it is the opinion of the Superintendent that such installation will prove more economical and more efficient than the employment of additional personnel.

"A formal request to purchase this equipment was presented to the Tuscaloosa County Board of Revenue. Although sympathetic, this Board found it necessary to refuse the request.

"For the Tuscaloosa County Superintendent of Education I am asking your opinion on the following question:

"1. Can a county board of education use public school funds for the purchase of an accounting machine for the central office, if the failure to purchase such a machine will require a larger expenditure for the employment of additional clerical personnel?"

In my opinion, your inquiry must be answered in the negative.

It is provided by Title 52, Section 130, Code of Alabama 1940, with regard to the purchase of office supplies and equipment for the office of the county superintendent of education, or his assistants, that:

"Supervisors, clerical assistants, offices and equipment.—The county board of education may in its discretion provide upon the nomination of the county superintendent of education, at least the following assistants: An elementary school supervisor and a statistical and stenographic clerk. No person shall be eligible for appointment as such supervisor who does not hold a certificate of administration and supervision as required of county superintendents of education. The county board of education may employ additional clerical and professional assistants, including health supervisors, and may reimburse them for all actual traveling expenses necessary in the performance of their official duties. The county superintendent is hereby required to maintain an office at the county seat. The county board of revenue or court of county commissioners shall provide the county superintendent of education and his professional and clerical assistants with ample, convenient and comfortable office quarters. The county board of revenue or court of county commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the county superintendent of education and his assistants."

This section requires the county governing bodies of the respective counties to furnish the county superintendent of education, and his assistants, with office quarters and the necessary furniture, office equipment, and supplies which may be required by the superintendent or his assistants, such items to be paid for from funds of the county rather than from public school funds. In my judgment, the language of this statute is limiting in the sense that all such purchases must be approved by the county governing body and paid for only upon its approval. Biennial Report of Attorney General, 1934-36, page 372.

While it is true that Title 52, Section 62, Code of Alabama 1940, vests in the county board of education a broad range of administrative and supervisory authority over the educational affairs of the county, such authority and discretion must be exercised within the limits prescribed by law.

Concerning the inquiry at hand, I find no specific provision of law authorizing public school funds to be used for furnishing office equipment for the office of a county superintendent of education or his assistants, and in the absence of such authority, it is my opinion, that the specific mandate of Title 52, Section 130, supra, should be followed, and that all such purchases should be made by, or with the approval of, the county governing body and payment therefor made from funds of the county, rather than from public school funds. Quarterly Report of Attorney General, Vol. 19, page 233; Quarterly Report of Attorney General, Vol. 20, page 40.

Certain it is that the item of equipment mentioned by you in your inquiry, that is, an accounting machine, could not be defined as anything other than office equipment. I am likewise advised by a representative of the State Department of Education that in Tuscaloosa County, as in the other counties of the State, there is no distinction between the office, or offices, of the county superintendent of education and the office, or offices, of the county board of education and that, in fact, only one set of offices exists, those being the offices of the county superintendent of education, which offices are used by the county board of education when the occasion therefor arises. Therefore, the above-quoted statute, Title 52, Section 130, supra, applicable to the office of the county superintendent of education is likewise applicable to the office of the county board of education. Quarterly Report of Attorney General, Vol. 20, page 40.

The question of the advisability of the purchase outlined in inquiry is not subject to opinion of this office, such being a matter addressing itself to the County Board of Education and the County Governing Body of Tuscaloosa County, and as heretofore pointed out, such purchase can only be made with the approval of the county governing body and paid for from funds of the county.

I find no local laws applicable to Tuscaloosa County pertinent to the question here considered.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 15, 1948

Hon. W. H. Haigler, Jr.,
 Secretary-Treasurer,
 State Licensing Board for
 General Contractors,
 C A P I T O L.

General Contractors—State Licensing Board.

When a partnership, which is licensed by the State Licensing Board for General Contractors, changes its name, it is not necessary to procure a new license from said Board.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of August 13, 1948, is as follows:

"The State Licensing Board for General Contractors respectfully requests your official opinion on the following matter:

"If the Board has issued a license to X partnership, composed of partners A and B, would partners A and B have the right to continue to do business under such license if they changed the name of the partnership to Y partnership, or would the change in the name of such partnership make it necessary for them to buy a new license?

"Would the answer to the above question be any different if the partnership were a limited partnership?"

II
 may be answering your inquiry, it is my opinion that partners A and B may continue to do business under the old license, although they have changed the name of the partnership from X partnership to Y partnership. The change of the name of the partnership has not affected the rights of the partnership under the old license with the Board.

746, provisions of C. J., Partnership, Section 147, page 736, and Section 169, page 746, provide as follows:

with "§147. At common law a partnership may be validly organized, is to put any provisions in the agreement as to the name under which it is to do business, may acquire a name by usage, or may exist without any name. In the absence of a statute to the contrary, a partnership has the right to adopt any name it may choose, and it may use a name suitable to or suggesting a corporation, or may use the name of a partner's estate. The firm name may be that of an individual partner, the surnames of all the partners, or the surname of one or more of the members with the addition of '& Co.,' or it may consist of individual names, wholly distinct from the names of any of the

members; or it may be a name purely fanciful. But whatever the firm name may be, it is simply a convenient abbreviation of the individual names of the partners; and hence the signature of the firm name is in law the signature of the several partners' names; * * * *"

"§169. A change in the name of a firm does not affect its right or liabilities respecting third persons."

My answer to your question would be the same if the partnership involved is a limited partnership. Title 43, Sections 6 and 9, Code of Alabama 1940, provide as follows:

"§6. Limited partnerships for the transaction of any mercantile, mechanical, manufacturing, or other lawful business, within this state, may be formed by two or more persons, upon the terms, and with the rights and powers and subject to the conditions and liabilities in this chapter; but its provisions must not be construed to authorize any such partnership for the purpose of banking or insurance business."

"§9. The persons desirous of forming such partnership must make and severally sign a certificate containing:

(1) The name or firm under which such partnership is to be conducted;

(2) the general nature of the business to be transacted;

(3) the names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence;

(4) the amount of capital which each special partner has contributed to the common stock;

(5) the period at which such partnership is to commence and terminate;

(6) the amount, or amounts, which any one or more of the special partners agree to become liable for in addition to the amount of capital which he, or they, have contributed to the common stock.

(7) Such certificate must be acknowledged and sworn to by one or more of the general partners before an officer authorized to take acknowledgments who must endorse such acknowledgment and sign the same."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1948

Hon. John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Mortgage Filing Tax.

Where indebtedness described in a mortgage or like instrument coming within the meaning of Title 51, Section 619, Code of Alabama 1940, incurs upon a contingency, then such indebtedness does not arise nor does any filing tax become due thereon unless and until the contingency happens. Under such circumstances, the mortgagee or owner of same, upon presenting the instrument for filing and before it can be admitted to record, is required to make a proper and sufficient bond under the conditions prescribed under Section 619 (b), supra, to insure the payment of any mortgage filing tax that might become due thereon in the future. Opinion of Attorney General, Office Edition 1931, Vol. II, page 86, overruled.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of August 4, 1948, is as follows:

"I am enclosing a copy of a mortgage filed in my office for record on July 2, by McDonnell & Jones, attorneys of Sheffield. Since there is some question as to the amount of the mortgage tax due on same, I will appreciate your opinion as to the matter."

A more comprehensive presentation of the question and the facts involved is set forth in the letter to you from the Honorable Gorman R. Jones, Jr., of Sheffield, Alabama, dated August 2, 1948, the original of which you attached and which is quoted in pertinent part as follows:

"We submit herewith this petition, through the Probate Judge of Colbert County, Alabama, for you to ascertain the amount of mortgage tax required on that certain mortgage hereinabove referred to, and a copy of which is hereto attached, all pursuant to Para. (b), Section 619, Title 51, Code of Alabama 1940.

"The mortgage has been given as indemnity against the contingency of Jerome E. Carroll, the mortgagee, having to pay any part of the mortgage indebtedness on the two mortgages to the First National Bank which are referred to in the mortgage in question. Joe B. Moore, the Mortgagor, purchased on July 31, 1948, all of the interest of the mortgagee in and to the Tennessee Valley Machine & Welding Co., including all real and personal property, which the

parties had theretofore operated as a partnership. As a part of the consideration for the sale of the interest of the mortgagee in the business, the mortgagor agreed to assume and pay off the two mortgages and the notes secured thereby, for which the parties are jointly and severally liable, and to indemnify the mortgagee against any payment on account of the same. All the mortgage in question seeks to do is to serve as security for the indemnity agreement in the deed and bill of sale to the business. You will note that there is a balance due on the real estate mortgage of \$2,932.17, and a balance due of \$14,660.38, on the chattel mortgage."

In consideration as is recited in the mortgage so referred to is as follows:

"NOW THEREFORE, in consideration of the premises and to secure the Mortgagee and save him forever harmless for or on account of the payment of any part of the said mortgage indebtedness hereinabove referred to, and all costs or expenses incident to the collection or payment of the same, and in further consideration of \$1.00, paid by the Mortgagee to Mortgagor, the receipt of which is hereby acknowledged, the Mortgagor and his wife, * * * *, hereby grant, bargain, sell and convey, * * * *."

Title 51, Section 619(b), Code of Alabama 1940, is quoted as follows:

"If any part of the indebtedness which the mortgagor or debtor in any other instrument is authorized to incur under the terms of the instrument has not been, or will not be, presently incurred, at the time such instrument is offered for record, the tax shall be paid on the amount of indebtedness presently incurred, and the department of revenue, upon the petition of the owner of any such instrument, or upon the petition of the agent or attorney of such owner, shall ascertain to its own satisfaction the amount then taxable, and the amount to be incurred thereafter, and determine the amount upon which the tax shall be paid at the time such instrument is offered for record, and shall endorse its findings on such instrument. Upon the presentation of such instrument with such endorsement thereon, the judge of probate of any county in which the instrument is offered for record, upon the payment of the tax upon the amount so ascertained by the department of revenue, and the recording fees of the probate judge, shall accept the same for record. The department of revenue shall also require the owner of such instrument to execute a bond, in an amount sufficient to secure the state the privilege tax to become due and payable under this section upon the amount of the indebtedness to be incurred thereafter, such bond to be approved by the department of revenue and payable to the State of Alabama, and conditioned that the owner of such instrument will promptly report to the said department of revenue and to the probate judge of the county where said instrument is first filed for record, whenever such owner or his successor in interest incurs any additional indebtedness thereunder, and the amount so incurred; and that the said owner of such

instrument will pay or cause to be paid to the judge of probate of the county in which said mortgage is first filed the privilege or license tax required under this section, upon the accrual of any additional indebtedness, and that the said owner of such instrument will report to the said probate judge and the department of revenue during the month of September of each year the amount of all indebtedness and all bonds, debentures, notes or other forms of indebtedness, incurred or certified and delivered under said instrument to such date, and the amount so certified and delivered during the preceding twelve months, and the aggregate of all such evidence of indebtedness certified and delivered under such instrument prior to such year. The bond executed to secure payment of the tax herein required shall cover a term of five years, and after the expiration of said term of five years, the owner of the instrument offered for record shall execute such further bond as may be required by the department of revenue covering the succeeding term of five years, and thereafter every term of five years, in the same manner so long as any of the indebtedness authorized to be incurred by such instrument has not been incurred with like condition and in such sum as the said department may prescribe."

The sum of one dollar named as a part of the consideration in the mortgage represents a nominal consideration and one that is alleged to have been paid by the mortgagor to the mortgagee and is not taxable as a part of the mortgage indebtedness.

It would therefore appear that no part of the indebtedness secured by the mortgage has "presently incurred" or would be immediately subject to the tax. Whether, under the terms of the mortgage, the whole or any part of the indebtedness described therein will "incur thereafter" or in the future depends purely upon a contingency or an event which may or may not happen. If, on the one hand, the mortgagor pays the full amount of the balance due on the indebtednesses secured by the two mortgages given by said parties to First National Bank of Tuscumbia, Alabama, and all costs or expenses incident to their collection or payment, then there will be no indebtedness to "incur thereafter" under the mortgage in question; hence no tax to be paid. On the other hand, should the mortgagor fail to make his payments on the Bank's mortgages and the mortgagee have to pay the whole or any part of the balance of said indebtedness, then any such payment or payments the mortgagee would have to pay on the balance of the indebtedness secured by those mortgages would become to the extent of such payment or payments indebtedness incurred on the mortgage in question, and as such would immediately become subject to the mortgage tax under Section 619, *supra*.

It has been held that a mortgage is a mere incident to a debt, and that the debt is the principal thing, and where there is no debt there is no mortgage. *Stollenback v. Marks and Gayle*, 188 Ala. 587, 65 So. 1024, 1027; *Nelson v. Wadsworth*, 171 Ala. 603, 55 So. 120.

Black's Law Dictionary, Third Edition, at page 525, defines a debt as "a sum of money due by certain and expressed agreement; as a bond for a definite sum, a bill or note, a special bargain or a rent reserved on a lease, where the amount is fixed and specific, and does not depend on any subsequent valuation to settle it."

A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does it become a debt until the contingency has happened. *People v. Arguello*, 37 Cal. 524.

I am of the opinion that the mortgagee should be required, before this instrument is admitted to record, to make and execute a proper bond in accordance with the provisions of Section 619(b), supra, and as the State Department of Revenue may require, securing the amount of tax that might be assessed in the future against the whole or any part thereof of the unpaid balances alleged to be due in the amounts of \$2,932.17 and \$14,660.83, respectively, on the two mortgages to the Bank, including an amount sufficient to pay the tax on any additional sums that might be incurred in the way of costs and expenses incident to the collection or payment of said indebtednesses. The mortgagee or the owner of this mortgage should, therefore, file a petition accordingly with the State Department of Revenue to have the required amount of such bond ascertained.

This opinion is in conflict with a former opinion of this office contained in Report of the Attorney General, Office Edition 1931, Vol. II, page 86, which opinion is hereby overruled.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1948

Hon. Tom C. Garner
Probate Judge,
Probate Court of Jefferson County,
113 Court House,
Birmingham 3, Alabama.

Deeds—Filing Tax—Trust.

The recordation of an instrument conveying property in trust for the grantors is subject to the filing tax imposed by Title 51, Section 618, Code of Alabama 1940.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion bearing date of July 16, 1948, is as follows:

"I am attaching, hereto, copy of trust agreement which has been presented to us for recording. In your opinion, do you consider this instrument taxable on the value of the property conveyed?"

"There has been some correspondence with your office by Mr. W. H. Brantley, Jr., an attorney of this city, and we would like to have this information to pass on to him, in order that he may so inform his client."

The instrument which you have attached to your request consists of a written deed executed by the devisees of the will of Thomas Mills Nesbitt to Jule Rembert Nesbitt and Thomas Mills Nesbitt, Jr., as trustees. The trustees are two of the grantor devisees, and they, together with the other devisees, conveyed certain described property situated in Jefferson County, Alabama, to the two named grantees in trust for all grantors therein.

The instrument is also a conveyance under a prior trust which expired June 27, 1948, by Jule Rembert Nesbitt and Thomas Mills Nesbitt, Jr., as trustees under such prior trust, to themselves as trustees for all the grantees, including themselves, of all property of every kind, real, personal, and mixed, which such trustees held or owned under the prior trust. It is not clear whether there is any relation between these two conveyances, but such inquiry would seem to be irrelevant in any event.

The terms of the prior trust are not set forth in the instrument attached to the request, and no information thereof is disclosed. It does not appear that this conveyance by the trustees to themselves was for a nominal consideration to perfect title, and for aught that appears this conveyance was necessary for the purpose of vesting title to the property in the trustees under the trust agreement attached by you, the prior trust having expired.

The instrument provides that the trustees shall manage the property during the life of the trust and shall pay over from the net income therefrom to the beneficiaries a reasonable cash balance after the close of each fiscal year.

It is provided that the trustees may terminate the trust at any time and in any event the trust shall terminate ten years after the death of the last of the grantors.

The written instrument is signed by each of the grantors and their spouses and notarized.

It is my opinion that this instrument should not be received for recordation until the privilege tax levied by Title 51, Section 618, Code of Alabama 1940, has been paid.

The instrument is a deed conveying real, personal, and mixed property in trust.

Said Section 618 provides:

"No deed, bill of sale, or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in such property, except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, * * * , shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: * * *."

Following such quotation the section sets forth the rates of levy of such tax.

The instrument to which you refer conveys an interest in real and personal property within this State. The tax is measured by the value of such property conveyed, and not the consideration of the conveyance.

It does not appear that the instrument falls within any of the exemptions or exceptions set forth in Section 618.

It has been previously ruled by this office that deeds of trust are within the class of instruments defined and designated for the filing tax on deeds. Biennial Report of Attorney General 1928-1930, page 264.

It has likewise been held that the recordation of a deed given by trustees of property is subject to such tax. Quarterly Report of Attorney General, Vol. 1, page 117. Quarterly Report of Attorney General, Vol. 47, page 169.

Your question is therefore answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 15, 1948

Hon. John S. Shaw, President,
Board of School Commissioners,
Mobile County, Box 1549,
Mobile 9, Alabama.

Taxation—Corporations—Exemptions—Refunds.

Taxpayer is not entitled to exemptions under Title 51, Section 2, Code of Alabama 1940, unless all property claimed exempt from taxation as provided by Title 51, Section 41, Code of Alabama 1940, is listed with the Tax Assessor by taxpayer and entered, showing the items of property sought to be exempt, on or before the third Monday in January of each current tax year.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion, bearing date of July 30, 1948, is as follows:

"Upon the instruction of the Board of School Commissioners of Mobile County, and in the name of and for and on behalf of that Board, the Board's Attorney, Mr. Palmer Pillans, wrote to you a letter of inquiry with respect to a petition of the Woman's Clubhouse Association for refund of taxes claimed to have been paid by mistake under such circumstances as to justify their repayment.

"Now Mr. Pillans has handed to us your good letter of July 26th, from which we learn that the Board's inquiry should have been signed by its executive head instead of its attorney.

"Accordingly, I, John S. Shaw, President of the Board of School Commissioners of Mobile County, do now request of you that you give your opinions in writing, pursuant to the pertinent provisions of law, on the question, connected with the duties of the Board, set out in our Attorney's said letter to your good self under date of July 23rd, 1948, which letter is attached hereto and made a part hereof as fully as if copied into the body of this request."

The alleged facts of this case are submitted by you through the letter of your attorney, Mr. Palmer Pillans, dated July 23, 1948, and which you attach. Excerpts from the papers of the corporation concerning the purposes for which it was created, as set forth by Mr. Pillans, are as follows:

"A resolution was adopted declaring in favor of the incorporation of the Association as a social society to create and maintain an organized center of thought and activity among the women of Mobile;

'To aid in the promotion of their mutual interests in the advancement of science, education, civics, patriotism, literature, art and community service '

"Under the scheme of incorporation which prevailed when the Club was incorporated in January, 1929, the incorporation was accomplished by filing a signed resolution setting out the essential facts with reference to the corporation, its name, its officers, members, etc.; accompanying this with a copy of the Association's constitution. That course was pursued in the instant matter and, in Article II of the Constitution, the objects of the Association were stated to be, as here pertinent:

" 'To aid in the promotion of their mutual interests in the advancement of science, education, civics, patriotism, literature, art and community service; and To provide a place to meet for the comfort and convenience of its members.'

"The Association was not organized for business or profit, and has no shares of stock, nor has it ever served any purpose other than that indicated in its incorporation papers."

The charter of the corporation in question and the purpose for which it is created as is manifested by its incorporation papers are very similar in character, and for all practical purposes the same, as those of the Alabama Federation of Women's Clubs, Inc., of Jefferson County, Alabama, and whose clubhouse property this office determined was exempt from ad valorem taxes under Title 51, Section 2(d), Code of Alabama 1940, as property used by an incorporated literary society (Quarterly Report of Attorney General, Vol. 49, page 65). And, for the same reason, the property of the corporation in question appears to be exempt from the payment of such taxes.

However, it appears from the statement made by Mr. Pillans that the Woman's Clubhouse Association of Mobile, a corporation, has voluntarily and allegedly through mistake paid ad valorem taxes on its clubhouse property for the years 1946 and 1947, without setting up or claiming the exemption as is required by Title 51, Section 41, Code of Alabama 1940, on or before the third Monday in January of what was then the current tax years. Under such circumstances then it would appear that the corporation would not be entitled to a refund of any of such taxes for the year 1946 or 1947.

This office has consistently ruled in construing Sections 29, 31, and 33 of the Revenue Acts of 1935, Act No. 194, General Acts 1935, page 256, approved July 10, 1935 (now Title 51, Sections 37, 39, and 41, Code of Alabama 1940), that even though property was exempt from ad valorem taxation such exemption must be claimed on or before the third Monday in January of each current tax year, otherwise such exemption is waived. Quarterly Report of Attorney General, Vol. 8, page 316; Quarterly

Report of Attorney General, Vol. 10, page 27; Quarterly Report of Attorney General, Vol. 17, page 28; Quarterly Report of Attorney General, Vol. 30, page 52.

The Supreme Court of this State has also reached the same conclusion in *Jones v. Johnson*, Tax Assessor, 240 Ala. 357, 199 So. 339, in construing the Revenue Acts 1935 with regard to the homestead exemption. And in considering the statute exempting property, including real estate, from taxation where the income therefrom was used exclusively for specified school purposes, the same Court held that the right to such exemption is one that the taxpayer must claim with each annual assessment. *State v. Alabama Educational Foundation*, 231 Ala. 11, 163, So. 527, 532.

I am, therefore, of the opinion that, under the facts as submitted by you, the Woman's Clubhouse Association of Mobile is not entitled to any refund as to the ad valorem taxes paid by it on its property in Mobile County for the years 1946 and 1947, unless the corporation made a claim for such exemption in accordance with the provisions of Section 41, *supra*, before the third Monday in January of each of such tax years. Under the circumstances, and as it would appear that the corporation is not entitled to any refund, I deem it unnecessary to answer the other questions presented by you in your letter.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 15, 1948

Hon. Frank A. Boswell, Director,
Department of Corrections and Institutions,
C A P I T O L.

Department of Corrections and Institutions.

The Director of State Department of Corrections and Institutions authorized to expend funds for the purpose of awarding prizes to convicts in athletic contests.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of August 5, 1948, is as follows:

"Attached hereto is memorandum dated June 18, 1948, to all wardens and superintendents authorizing the expenditure of \$5.00 at each road camp and \$7.50 at each major prison as prizes to be

awarded to convicts as a part of the Fourth of July celebration at the several road camps and prisons.

"It is requested that you render an opinion as to whether or not the Director of the Department of Corrections and Institutions has the authority to authorize prizes as outlined in the memorandum referred to.

"Under provision of Section 3, Title 45, Code of 1940 and other statutes pertaining to the Department of Corrections and Institutions it is felt it is the duty of the Director of the Department of Corrections and Institutions to make every effort to rehabilitate criminals in our custody, and it is also felt that the practice of awarding prizes for participation in athletic events is a method of rehabilitation.

"The State Comptroller has withheld payment of expense accounts for superintendents and wardens covering these prizes until an opinion can be rendered on this subject by your office."

Your memorandum dated June 18, 1948, to all wardens and superintendents, is as follows:

"Subject: Holiday—Fourth of July.

"Since July 4, comes on Sunday, Monday will be observed as a holiday. It is my desire that all of the prisoners be given this day. Suspend all work as far as possible.

"I will appreciate it if the wardens and superintendents will take an interest in arranging an athletic program for this occasion. This will be authority for the superintendents of the road camps to spend as much as \$5.00 for prizes to the inmates. At the major prisons this will be authority to spend up to \$7.50, to be awarded as prizes in athletic events. I recommend races, pie eating contests, baseball, boxing, etc.

"It is my wish that all inmates be given a good dinner on this day. For major institutions the department has enough cockerels for fried chicken. For the road camps, I suggest that ham be used. At the major prisons iced tea will be served. This will be authority for the superintendents to purchase enough lemons to give inmates at road camps lemonade for their noon day meal. Other supplies required to prepare a good dinner will be drawn from the commissary."

It is my opinion that you have authority to award prizes to convicts participating in the prisons athletic program. In so deciding I am not unmindful of the well established rule of law that public funds cannot be expended unless there is express or implied authority.

Broad powers were vested in the director by the law creating the department and fixing its functions. Section 7, Title 45, Code of 1940, provides that "the director shall have all power and authority necessary or convenient to carry out the functions and duties of the department." The functions and duties are defined as follows: "To manage, supervise, and control all penal and correctional institutions . . . to promulgate such rules and regulations necessary to hygiene, sanitation, cleanliness, healthfulness, feeding of prisoners, management and security of all prisons and jails." (Section 3, Title 45, Code of 1940) After charging the director with such broad responsibilities the legislature wisely refrained from impeding him in the performance of his duties by specific provisions for the expenditure of the department's funds. After fixing the functions and duties of the department as above set out, Section 3 (*supra*) provided an appropriation "to be used for the purposes set out in this section." No effort was made by the legislature to direct what part or in what manner the funds should be devoted to sanitation, feeding of prisoners, or to medical services, etc. It is left to the director to determine what constitutes hygiene, sanitation, healthfulness, etc., and how much of the funds shall be devoted to each. Athletic contests are a recognized and accepted part of a health building program. The awarding of prizes is a reasonable method of promoting such a program. There is, in my opinion, adequate authority implied in the provisions quoted for the proposed expenditure.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

September 16, 1948

Hon. G. H. Stacy
Judge of Probate,
Bibb County,
Centerville, Alabama.

Municipalities—Elections—Voters.

Residence requirements of qualified electors entitled to participate in municipal elections discussed generally.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of September 1, 1948, is as follows:

"Please give me an official ruling, as soon as possible, upon the following questions:

"1. If a person is a qualified voter in and actually resides within the corporate limits of the Town of Centerville, Alabama, but moves

with his family within a period of three months prior to the City Election to be held on September 20, 1948, to another place of residence in Bibb County, Alabama, outside of the corporate limits of said Town of Centerville, is such voter eligible to vote in said City Election even though he actually resides outside of the corporate limits?

"2. Who is considered to be a qualified voter in a Municipal Election?

"3. There are several cases where persons who were residents and qualified voters in the Town of Centerville and they moved several years ago to other parts of the State of Alabama and other States and they have maintained the box in the Town of Centerville as their voting place and have continued to vote absentee ballots down through the years but they actually reside and work outside of the corporate limits of the Town. Are such persons eligible to vote in the next City Election in the Town of Centerville either by absentee ballot or by appearing at the polls and voting in person?

"4. How long must a voter reside within the corporate limits of a Town or City before he can vote in the election for that particular Town or City?

"5. When is a person a resident of a Municipality as contemplated by and under the present election laws?

"6. Can a voter actually maintain a home in one municipality where he actually lives and works and claim to be a resident of another Town or City and thereby be qualified or allowed to vote in the elections of said latter Town or City?

"7. Who is a resident elector in a municipal election?

"8. Can a person who has moved away from West Blocton, Ala. but who votes in State and county election vote in a town election?

"9. A and B are both former residents of West Blocton, A moves to another city but maintains West Blocton as his voting place. He votes in state and county elections and also votes in West Blocton, municipal election (probably by absentee ballot) Is this legal?

"10. B Moves to Smith Hill (about half mile from West Blocton) and out of corporate limits, votes in state and county elections in West Blocton, but is denied a vote in municipal election because he has been out of the city limits for four months. Is this correct?

"11. C a qualified elector of West Blocton, Ala. moves to Centerville, Ala. two months ago. It is my understanding that he cannot vote in West Blocton, because he has moved out of the corporation and

he cannot vote in Centerville because he hasn't been there long enough to establish residency. Is this correct?

"12. If residing 3 months in corporate limits establishes residency, how long does a voter have to be out of corporate limits to lose his privilege of voting in city election?

"13. D is a qualified elector in Tuscaloosa County, has been residing in West Blocton six months. Is he eligible to vote in West Blocton city election?

"14. E, a qualified elector in Centerville, Ala. has resided in West Blocton for three months and he has not transferred to Beat 10 or Beat 11 (in which West Blocton is located). Is he eligible to vote in West Blocton, city election?

"15. F, who resides in West Blocton, Ala. has a son G. G was in the army, when discharged he married, got a position with a firm which job required considerable traveling. He and his wife lived in several cities, and at this time is being transferred to another city but he has not secured an apartment. Pending getting located his wife is staying with F. However G has no intention of moving to West Blocton. G has maintained West Blocton as his voting place although he has been away several years. Can he vote in West Blocton City election?

"16. H has a son who after getting out of the army secured a position which required him to travel most of the time. This young man is not married, and though he has been away from West Blocton several years, he visits his parents there frequently. He is a qualified elector in West Blocton, and considers this his voting place, and so far as I know considers the home of his parents his home. Is this young man eligible to vote in West Blocton City election?

"17. Are qualified elector of a municipality in the army or off at school qualified to vote in city election?

"18. If it is ruled that a person who has moved away from West Blocton, Ala. and still maintains this as his voting place and that he can vote in city election just where would you place him as residing within the corporation, would it be the location from which he moved or just how would you place him as a resident of the city?"

At the outset, I deem it advisable to state that Act No. 478, General Acts 1945, page 711, approved July 7, 1945, the statute governing absentee voting in Alabama, applies to municipal elections. Consequently, any person qualified to participate in a municipal election is entitled to cast an absentee ballot in such election, in accordance with the procedure established therefor in said act, if he is absent on the day of the election by reason of his regular business and in the performance of his regular duties.

Opinion of the Attorney General to Hon. Wilbur Poyner, Mayor, Town of Newton, Dale County, Newton, Alabama, under date of July 8, 1948, a copy of which is enclosed.

The varied and sundry questions which you ask all deal with the general subject of the residence requirements of qualified electors entitled to participate in municipal elections.

I will first set forth the pertinent constitutional and statutory provisions and cite and quote from pertinent decisions of the Supreme Court of Alabama, and will then attempt to apply these constitutional and statutory provisions and the rules laid down by the Supreme Court of Alabama in these decisions to the specific questions propounded by you.

Constitution of Alabama 1901, Section 178, reads as follows:

"To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; provided, that any elector who, within three months next preceding the date of the election at which he offers to vote, has removed from one precinct or ward to another precinct or ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal." (Emphasis supplied.)

Title 17, Section 14, Code of Alabama 1940, is to the same effect as the proviso in Section 178, *supra*.

Constitution of Alabama 1901, Section 181, as amended by Amendment LV, proclaimed ratified November 14, 1946, which sets forth the persons entitled to register as electors in this State, provides, as to residence, as follows:

"* * * * * if their place of residence shall remain unchanged, will have, at the date of the next general election, the qualifications as to residence, prescribed in section 178 of this article, * * * * *"

Title 17, Chapter 1, Article 3, Sections 21-56, Code of Alabama 1940, as certain of said sections have been amended in respects not here material, are the statutory provisions governing the registration of electors in this State. See particularly Section 32, which is the statutory counterpart of Section 181, *supra*. Your attention is also particularly called to Sections 44 et seq., which govern the purging of the registration list of a county.

Title 17, Section 174, Code of Alabama 1940, provides:

"Elector must vote in county and precinct of residence.—At all elections by the people of this state the elector must vote in the county and precinct of his residence and nowhere else, and must have registered as provided in this chapter; and if any elector attempts to vote in any precinct other than that of his residence, his vote must be rejected, except as provided in section 14 of this title."

Title 17, Section 78, Code of Alabama 1940, reads:

"Meaning of precinct.—Whenever the word 'precinct' is used in this chapter, it shall include ward or wards in any incorporated towns and cities."

Title 17, Section 17, Code of Alabama 1940, provides:

"Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."

Act No. 465, General Acts 1945, page 699, approved July 6, 1945, governs elections generally in towns and cities of this State other than those having a commission form of government. Section 1 thereof provides, as pertinent, as follows:

"Elections in cities and towns of this state shall be conducted according to the general election laws except as otherwise provided in this title. * * * * *"

(All of the above cited or quoted constitutional or statutory provisions are a part of the general election laws of this State.)

Sections 6, 8, 9, and 10 of said act read, respectively, as follows:

"The voting places shall be fixed by the council, one or more voting places for each ward, where such city or town has been divided into wards, and the elector must vote in the ward of his residence and nowhere else, and if any elector attempts to vote in any ward other than that of his residence, his vote must be rejected. It is provided, however, that any elector who, within three months next preceding the date of the election at which he or she offers to vote, has re-

moved from the ward to another ward in the same city or town, shall have the right to vote in the ward from which such elector has so removed, if he or she would have been entitled to vote at such ward but for such removal."

"The mayor of the city or town shall cause to be made duplicate copies of so much of the registration list of the county in which the city or town, or any part thereof, is located, as may embrace the registered and qualified voters who reside within the corporate limits of such city or town, dividing the same into separate alphabetical lists of the registered voters of each ward, where such city or town has been divided into wards. He shall have compared such copies with the original registration lists and shall correct the same so they shall be accurate, and shall certify on each that it is a correct list of the registered voters for the town or ward to which it appertains. He shall have full access to all registration lists of the county for this purpose. One of each of said duplicates shall be filed with the clerk of the city or town where it shall remain as a record of his office, and on or before the date of election, and before the opening of the polls, he shall furnish the inspectors for the respective wards or polling places with a copy of the list of registered voters of the ward or town for which such inspectors were appointed."

"For the purpose of all municipal elections, the lists furnished to the inspectors by the mayor shall be taken to be correct, but subject, if error is alleged, to be corrected by comparison with the original registration lists."

"In the event the mayor or other chief executive officer of any city or town is a candidate in any municipal election held under the provisions of this article, he shall be disqualified to perform the duties set forth in the two preceding sections, and said duties shall be performed by a disinterested person appointed by the board of aldermen, or other governing body of the city or town."

In *Pope v. Howle*, *Allen v. Cooper*, 227 Ala. 154, 149 So. 222, we find this excellent statement as to the legal principle governing the domicile (legal residence) of an elector:

"* * * * * Domicile of the elector is a mixed question of law and fact, depending upon the intention and acts of the elector. Cases illustrating such fact which may be consulted with profit are: In *Holmes v. Holmes*, 212 Ala. 597, 599, 103 So. 884, the law of domicile is thus stated: 'A domicile once acquired is presumed to continue until a change, *facto et animo*, is shown. *Bragg v. State*, 69 Ala. 204. If there was a change, there must have been both an abandonment of his former domicile with no present intention to return, and the establishment of another place of residence with intention to remain permanently, or, at least, for an unlimited time; the former may be inferred from the latter. *Allgood v. Williams*, 92 Ala. 551, 8 So. 722;

Caldwell v. Pollak, 91 Ala. 353, 8 So. 546; Young v. Pollak, 85 Ala. 439, 5 So. 279; Merrill v. Morrissett (76 Ala. 433), *supra*.'

"See, also, Lucky v. Roberts, 211 Ala. 578, 100 So. 878; Talmadge's Adm'r v. Talmadge, 66 Ala. 199; Frederick v. Wilbourne, 198 Ala. 137, 73 So. 442; Black v. Pate, 136 Ala. 601, 607, 34 So. 844; Griffin v. Wall, 32 Ala. 149; Boyd v. Beck, 29 Ala. 703; State v. Hallett, 8 Ala. 159.

"The effect of these cases may be thus stated: When the fact of the legal residence of a citizen is once established, such fact of residence is presumed to continue, and this presumption prevails until it is established by the evidence that he has elected to or has established a residence at or in another place. It may further be stated that, while the determination of the place of legal residence of a citizen presents a question of fact, yet, in determining that fact, the intention of the citizen is entitled to and must be given due consideration in connection with his relevant acts. It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector, seeking to cast or undertaking to cast his vote—that determines the right to vote in such precinct." (Emphasis supplied.)

In Huey v. Etheridge, 234 Ala. 264, 175 So. 268, the Supreme Court of Alabama had before it for decision the question of whether or not one Huey, who had received a majority of the votes cast in an election for Mayor of Town Creek, was qualified to hold said office. The facts showed that said Huey was a resident voter of Town Creek precinct when the election was held, but had not resided in the corporate limits of the town for three months next preceding the election. The Court, after quoting Section 1761, Code of Alabama 1923 (Title 37, Section 403, Code of Alabama 1940), held that the said Huey, in order to be qualified for the office of Mayor of Town Creek, had to be a qualified elector for and within the town, as distinguished from the county or precinct, at the time of his election. It then quoted Section 178, *supra*, and concluded:

"It must be noted that this provision deals with the right to vote in any election and recognizes a distinction between 'wards and precincts,' thus applying to municipal as well as other elections. We therefore affirm the judgment of the circuit court in holding that the appellant was ineligible to the office of mayor at the time of election."

In *Ex parte Bullen*, 236 Ala. 56, 181 So. 498, the Court had before it for determination the question of whether or not a qualified elector of Mobile County, domiciled in Ward No. 9 of the city of Mobile continuously for more than a year next preceding the municipal election at which he voted, had legally cast a ballot in said election in Ward No. 10, the ward in which he resided at the time he registered as an elector in Mobile County several years previous to said election, but from which he had removed his residence and domicile several years before to Ward No. 9 in the city of Mobile. The Court, in reaching the conclusion that he had

not legally cast his ballot in said election, quoted Section 178, *supra*, Sections 488 and 521, Code of Alabama 1923 (Title 17, Sections 174 and 78, Code of Alabama 1940, respectively, and spoke as follows:

"It is a familiar principle of law as well as political economy, that, residence at a particular place with the intention to remain there for an unlimited time, as a permanent place of abode constitutes domicile. A man can have but one domicile at one and the same time, though he may have numerous places of residence. 'His place of residence may be, and most generally is, his place of domicile, but it obviously is not by any means necessarily so, for no length of residence without the intention of remaining will constitute domicile.' Webster's New Int. Dict. 659; *Lucky v. Roberts*, 211 Ala. 578, 100 So. 878; *Pope v. Howle*, 227 Ala. 154, 149 So. 222.

"'Domicile (once existing) continues until a new one is acquired.' *Talmadge's Adm'r v. Talmadge*, 1880, 66 Ala. 199; *State v. Judge of Ninth Judicial Circuit*, 13 Ala. 805.

* * * * *

"This section of the Constitution (Section 178) fixes the essential qualifications of an elector in this state, and the requirements that: 'He shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote,' are used in the sense that he must be a domiciliary of the state, county and precinct or ward, at the time he offers to vote, except as provided in that section. (Emphasis supplied.) *Chase v. Miller*, 41 Pa. 403, 404; *McCrary on Elections*, 4th Ed., 73, § 98.

"The requirements of residence in the State, county and precinct or ward in said section of the Constitution, are set down * * * *, and it has been ruled here * * * *

"* * * * * that one who has not resided within the corporate limits of a town or city for three months prior to an election, is not an elector therein and entitled to vote, and hence disqualified to hold office in such town. *Huey v. Etheridge*, 234 Ala. 264, 175 So. 268.

* * * * *

"The conclusion is inescapable, that when the Constitution and statute sets down and prescribes the essential qualifications of electors and fixes the place where the elector must exercise his franchise, such provisions are mandatory, and the general rule, supported by almost unanimous authority, is that a vote cast at any other place than that provided by law is an illegal vote. 20 C.J. 70, § 26; *McCrary on Elections*, 4th Ed., pp. 67-71, §§ 87-95. See, also, *State ex rel. Coe v. Harrison*, 217 Ala. 80, 114 So. 905; *Black v. Pate*, *supra*; *Peabody v.*

Burch, 75 Kan. 543, 89 P. 1016, 12 Ann. Cas. 719." (Emphasis supplied.) In *Wilkerson v. Lee*, 236 Ala. 104, 181 So. 296, the Court said:

"A voter having acquired a legal residence, been duly registered as a voter of the county and precinct or ward, and paid his poll tax therein for the year in which the election is held, may retain such residence until he has abandoned and removed therefrom with the intent to become a resident elsewhere. Temporary absence from one's residence for the purposes of his employment and the like, without the intent to abandon the home town and acquire a domicile elsewhere permanently, or for an indefinite time, does not forfeit his right to vote. *Pope v. Howle*, 227 Ala. 154, 149 So. 222; *Caheen v. Caheen*, 233 Ala. 494, 172 So. 618; 8 Alabama Digest, Elections, 264, Key Number 72." (Emphasis supplied.)

In that case, the Court applied this general statement of the legal principle as to domicile or legal residence to several persons, and while what was there said as to those persons is highly illustrative as to the specific application of this legal principle, I do not deem it necessary to quote the same here.

Adverting now to the several questions propounded by you, I shall attempt to give answers to each of them in the light of the above cited or quoted constitutional and statutory provisions and the decisions of the Supreme Court of Alabama above cited and quoted from.

1. A qualified elector in the town of Centerville, who formerly actually resided within the corporate limits of said town, but who moved his family within a period of three months prior to the municipal election to be held on September 20, 1948, to another place of residence in Bibb County, outside the corporate limits of said town of Centerville, with the intention of making said place of residence his domicile or legal residence, is nevertheless eligible to vote in said municipal election, because of the last proviso of Section 178, *supra*, and Section 14, *supra*.

2. All qualified electors whose domicile or legal residence is within the corporate limits of a municipality, and has been for three months immediately preceding, are entitled to vote in municipal elections held therein; and, also, all qualified electors whose domicile or legal residence has been within the corporate limits of a municipality, but which has been moved therefrom to another place in the same county within three months prior to a municipal election held therein are entitled to vote in such election.

3. All qualified electors described in this question are eligible to vote in the next municipal election in the town of Centerville, either by absentee ballot or by appearing at the polls and voting in person, if their absence from the town of Centerville is temporary, and they have not by their intention and acts abandoned their domicile or legal residence in the town of Centerville, with no present intention to return, and established

another place of domicile or legal residence, with intention to remain there permanently, or, at least, for an unlimited time. The presumption is in favor of the domicile or legal residence of such persons continuing in the town of Centerville; and the fact that they have continued to exercise the rights of qualified electors in the town of Centerville, without having become qualified electors elsewhere, is strong evidence in support of this presumption. If such persons have not been purged from the registration list in Bibb County and their names appear on the list of qualified electors which is required to be furnished for use in municipal elections, then, in my opinion, such persons have the legal right to vote in the forthcoming election in the town of Centerville, just as do any other qualified electors whose names appear thereon. If they have not been purged from the registration list, they may vote in the forthcoming municipal election held in the town of Centerville by following the procedure prescribed by law for the casting of challenged votes.

4. A person otherwise qualified as an elector must have resided (been domiciled or had his legal residence) within the corporate limits of a town or city for three months immediately preceding a municipal election held therein, before he can vote in such election, unless he has removed therefrom to another place in the same county less than three months before such election.

5. It appears that this question seeks the same information as that sought by your question numbered 2, and you are respectfully referred to the answer to that question.

6. A qualified elector may actually maintain a home in one municipality where he actually lives and works and be a qualified elector in another municipality. This depends upon his intention and acts. For fuller description of this matter, you are respectfully referred to my answer to your question numbered 3.

7. It appears that this question seeks the same information sought by your question numbered 3, and you are respectfully referred to my answer to that question.

8. Since a person can only have one domicile or legal residence at one and the same time, if he is a qualified elector of West Blocton, he may vote there, and only there, in all state, county, and municipal elections. Whether or not he is a qualified elector of West Blocton depends upon his intention and acts, and you are respectfully referred to my answer to your question numbered 3 for a fuller discussion of this matter.

9. For information as to the status as a qualified elector in West Blocton of the person referred to in this question as "A," you are respectfully referred to my answer to your question numbered 8.

10. If the person referred to in this question as "B" has moved his domicile or legal residence outside the corporate limits of West Blocton

more than three months before the date of a municipal election held therein, he is not entitled to vote in such election, even though he may now have his domicile or legal residence in the precinct of West Blocton and would, therefore, be entitled to vote in state and county elections in said precinct.

11. The person referred to in this question as "C," having moved his domicile or legal residence from West Blocton to Centerville less than three months prior to a municipal election, would be entitled to vote in such municipal election in West Blocton, but not in Centerville.

12. A person who has been a qualified elector of a municipality must have removed his domicile or legal residence outside the corporate limits of the municipality more than three months prior to a municipal election held therein before losing the right to vote in such election.

13. If the person referred to in this question as "D" is a legally qualified elector in Tuscaloosa County, he could never vote in a municipal election in West Blocton in Bibb County, regardless of the length of time he may have actually resided in West Blocton. However, if he was formerly a qualified elector in Tuscaloosa County but removed his domicile or legal residence to West Blocton six months before the forthcoming municipal election in West Blocton, he could not be qualified to vote in such election, since he would not have met the residence requirements of twelve months in Bibb County, either as to registration or voting.

14. If the person referred to in this question as "E" has not moved his domicile or legal residence to West Blocton, even though he may have been actually residing there for three months, he would still be a qualified elector of Centerville. On the other hand, if he removed his domicile or legal residence from Centerville to West Blocton three months or more ago, he would be a qualified elector of West Blocton and may legally have his name transferred from Centerville to West Blocton by following the procedure therefor prescribed by law; or his name not having been so transferred, he may legally vote in a municipal election in West Blocton by following the procedure prescribed by law for the casting of challenged votes.

15. It appears that the person referred to in this question as "G" formerly acquired a domicile or legal residence in West Blocton, which according to his intention and acts as described in your question, he has not abandoned. This being the case, if he was formerly a qualified elector in West Blocton, he is still a qualified elector there, and entitled to vote in municipal elections held therein.

16. The statements made about the person referred to in your question numbered 15 as "G" are equally applicable to the person referred to in your question numbered 16 as "H."

17. Qualified electors of a municipality who are "in the army or off at school" are qualified to vote in municipal elections in such municipi-

pality. The domicile or legal residence of such persons is specifically preserved by Section 17, *supra*.

18. If a person who has acquired a domicile or legal residence in West Blocton has not, by his intention and acts, abandoned such domicile or legal residence, even though he has moved away from West Blocton, he would be entitled to vote in municipal elections held therein, if he is otherwise qualified, and his domicile or legal residence in West Blocton would be considered to be the place of his domicile or legal residence at the time he moved away, unless by his subsequent intention and acts, he has selected some other place within West Blocton as his domicile or legal residence. However, this would be wholly immaterial as to his right to vote in municipal elections, unless the municipality had been divided into wards.

In addition to the opinion to Hon. Wilbur Poyner, *supra*, I also enclose, for your information, a copy of an opinion rendered to Hon. J. H. Sims, Judge of Probate, Bullock County, Union Springs, Alabama, under date of April 19, 1948. Both of these opinions have direct bearing on the general subject here considered, and support the conclusions herein reached.

In answering your specific questions, in each instance where I have held that a person or persons were qualified to vote in a municipal election, I have assumed that, in addition to possessing the requirements as to residence, they have met all of the other requirements of qualified electors, such as registration and the payment of poll tax.

At the risk of tedium, I have sacrificed brevity for clarity, but have done so in the hope that this opinion will serve to answer the various questions which have arisen in regard to this subject throughout the State.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 17, 1948

Hon. David S. Evans, Mayor,
Town of West Blocton,
Bibb County,
West Blocton, Alabama.

Officers and Offices—Municipalities—Schools.

1. The position of Superintendent of School Bus Transportation of Bibb County is not an office of profit within the purview of Constitution of Alabama 1901, Section 280.

2. The office of mayor of a town and the position of superintendent of school bus transportation may be held by the same person at the same time.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of August 19, 1943. is as follows:

"I will appreciate an opinion from you or one of your assistants, at once, either formal or informal opinion the quickest way, on the following question:

"Would a man who is employed by the Bibb County Board of Education as Superintendent of School Bus Transportation and appointed to this job by the Board of Education, have to resign this job, should he be elected as Mayor of West Blocton?

"This man came in my office and qualified today, subject to an opinion from your office, and he does not wish to resign his position, so therefore I am wondering if this would be in violation of title 41; Article 2; No. 5 paragraph 7 and footnotes. I will hold up the printing of ballots a few days after qualification deadline, in order to get this opinion from you.

"Mayors position pays \$50.00 per month and his present job pays \$300.00 per month, and it might be possible the two jobs for profit would apply to him.

"I will appreciate an opinion soon as possible and regret having to ask at this close date, but we all wish to be in the clear."

I am of the opinion that your question should be answered in the negative.

The principal question involved is whether the individual described in your request would be holding two offices of profit within the meaning of Constitution of Alabama 1901, Section 280, which is restated in the statutes as Title 41, Section 5, Code of Alabama 1940. Section 280, *supra*, is as follows:

"No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

The mayor of a town holds an office of profit within the meaning of Section 280, *supra*. Biennial Report of Attorney General, 1928-30, pages 12 and 636.

The Superintendent of School Bus Transportation of Bibb County does not hold an office of profit within the meaning of Section 280, *supra*. An office implies a delegation of a portion of the sovereign power of the state and possession of it by the person filling the office. *Montgomery v. State*, 107 Ala. 372, 381, 18 So. 157, 159. One holding a mere position of employment does not hold an office of profit under Section 280 of the Constitution of 1901. *State v. Wilkinson*, 220 Ala. 38, 124 So. 213; *Kemp v. Wilson*, 17 Ala. App. 224, 84 So. 636. *State ex rel Glenn v. Wilkinson*, 220 Ala. 172, 124 So. 211.

I, therefore, conclude that the same man could hold both positions.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 17, 1948

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Municipalities—Elections—Voters.

1. The right to participate in elections upon the question of annexation of territory by a municipality is restricted to the qualified electors of the particular territory concerned who have resided therein for a period of three months prior to the date of such election, and does not extend to qualified electors of other voting districts, precincts, or counties of the State temporarily residing within such territory, but retaining their voting privileges in such other district, precinct or county.

2. To entitle one to participate in any election, such person must have resided in the State two years, in the county one year, and in the precinct, or ward, three months immediately preceding the election in which he offers to vote.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of September 3, 1948, is as follows:

"In connection with the pending election on the question of extending the boundaries of the City of Tuscaloosa under the provisions of Title 37, Sections 134 of the Code of Alabama of 1940, I should like to have your opinion on the following questions concerning the qualifications of voters in said election:

"1. May a person whose actual residence has been within the boundaries of the territory proposed to be annexed for more than ninety (90) days, but who has never qualified as a voter, be entitled to vote in said election if he qualifies by registration less than ninety (90) days prior to the date of said election?

"2. May a qualified voter vote in said election when he retains a voting place in the territory proposed to be annexed, but actually resides elsewhere?

"3. May a qualified elector who has resided within the boundaries of the territory proposed to be annexed for more than three (3) months next preceding said election vote in said election if he has maintained his voting place in some other precinct in the county?

"4. May a resident who has actually resided in the territory proposed to be annexed for more than ninety (90) days immediately preceding the election, but who is registered and qualified to vote in another county, be permitted to vote in said election?

"5. May a qualified elector vote in said election if he has actually resided within the territory proposed to be annexed for more than ninety (90) days next preceding the election if he is registered in another county, but prior to the election registers in Tuscaloosa County and changes his voting place to this county?

"In all the above questions assume that all poll tax requirements have been complied with.

"I shall appreciate an early reply to this letter since the election in which these questions arise is set for September 21, 1948."

The provisions of law applicable to the method of annexation inquired of in your request are to be found within Title 37, Chapter 5, Article 1, Sections 134-137, Code of Alabama 1940. The statutory provisions therein, pertinent to your inquiry, are Section 134, supra, which provides as follows:

"§ 134. Any town or city may, from time to time, extend its corporate limits in the manner set forth herein, but the provisions of this article shall not preclude any city from extending its corporate limits in any other way or manner that may be authorized by law."

and Section 135, supra, which provides, in pertinent part, as follows:

"§ 135. Whenever the council shall pass a resolution to the effect that the public health or public good requires that certain territory (describing it) shall be brought within the limits of the city or town:

* * * * *

"(2) Within ten days from the date of the filing of such resolution, the judge of probate must make and enter an order upon the minutes of said court, directing and ordering an election to be held by the qualified electors residing within the territory described, not less than twenty days nor more than forty days from the date of the making of the order. The said judge shall give notice of the holding of such election by publication in a newspaper published within the city or town whose limits are proposed to be extended if a newspaper is published therein, and if no newspaper is published in such municipality, then by posting notices at three public places in such municipality, which notice shall state the day on which such election is to be held, the voting place or places, the boundaries within which

voters must reside to vote at the respective voting places, which must be within the territory proposed to be brought into the city, or town, and such notice must give a description of the territory proposed to be annexed, and must state that a map of such territory is on file in the office of the judge of probate of said county, open to the inspection of the public.

* * * * *

"(4) Each qualified elector who has resided within the boundaries of the territory proposed to be brought into the city or town for three months next preceding the election, may vote at such election, but must vote at the voting place designated by the judge of probate for voters in the territory in which he resides." (Emphasis supplied)

It is to be observed from the above-quoted and emphasized portions of Section 135, supra, that the right to participate in such election is restricted to those qualified electors who have resided within the boundaries of the territory proposed to be brought into the city or town for three months next preceding the election. Construing this statute as a whole, it is my opinion that it is the intent thereof to restrict the right of participation not only to qualified electors, but also to qualified electors of the particular territory subject to annexation who have resided therein for a period of three months prior to the election. In my judgment, it was never intended to extend the right of participation in such an election to the qualified electors of other voting districts, precincts, or counties of the State who might be temporarily residing in such territory.

The requisite qualifications of an elector are stated by Section 178, Constitution of Alabama 1901, which constitutional provision, in pertinent part, provides as follows:

"Sec. 178. To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; * * * ." (Emphasis supplied.)

It is to be noted that this section prescribes the qualifications of persons to vote at "any election by the people."

To the requirements of residency, above set out, there must be added for the particular election here considered the requirement that all electors participating therein must have resided within the territory proposed to be annexed for a period of three months prior to the date of such election.

Having set out the above, I shall now consider and give answer to the specific inquiries presented by you in your request for opinion.

In my opinion, your first inquiry must be answered in the affirmative, provided such person meets all of the other requirements of a qualified elector as set out within Section 178, *supra*. You will note that registration as an elector is only one of the requirements one must meet in order to become eligible to participate in an election, the others being the requirements as to residency and the payment of all poll tax due, which you advise me in all cases mentioned by you in your request has been paid.

It is, therefore, my opinion that if the person mentioned by you in your inquiry meets all of the requirements of residency prescribed by Section 178, *supra*, has paid all poll tax due, has resided within the territory proposed to be annexed for a period of three months prior to such election, and has qualified by registration prior to the date of such election, such person is entitled to participate therein.

In my opinion, your second inquiry must likewise be answered in the affirmative. In my judgment, the terms "reside" and "resident" as used within Title 37, Section 135, *supra*, mean that such person must reside within or be a resident of the particular territory concerned for voting purposes, and have no reference to the actual physical residence of the person concerned. A person may have only one domicile for voting purposes, although such person may, in fact, reside in other and different places. The question as to the legal residence of an elector for voting purposes is a mixed question of law and fact, the answer to such question being governed by the intention of the person concerned as expressed by his words and acts. *Pope v. Howle*, *Allen v. Cooper*, 227 Ala. 154, 149 So. 222; *Huey v. Etheridge*, 234 Ala. 264, 175 So. 268; *Ex parte Bullen*, 236 Ala. 56, 181 So. 498; *Wilkerson v. Lee*, 236 Ala. 104, 181 So. 296. See also an opinion of this office rendered to Honorable J. H. Sims, Judge of Probate, Bullock County, Alabama, under date of April 19, 1948, copy of which I am furnishing you herewith.

In the former opinion of this office, above referred to, it was stated that in determining the question of the intention of a party with regard to his place of legal residence, the declarations of such party, although admissible to prove residence, are not necessarily conclusive because they may be disproved by his acts, and that one of the most conclusive and common acts would be registration and voting in another place.

In view of the above, it is my opinion that an elector, qualified in all respects, who maintains his domicile for voting purposes within the territory in question, and has done so for three months prior to such election, may participate therein even though such person is temporarily residing elsewhere.

Your third inquiry, in my opinion, must be answered in the negative for the reason heretofore pointed out that the right to participate in such election is restricted to the qualified electors of the particular territory concerned and does not extend to qualified electors of some other voting district, precinct, or county, now temporarily residing within such territory, but retaining their legal residence for voting purposes in such other district, precinct, or county. For the same reasons, your fourth inquiry must likewise be answered in the negative.

In my opinion, your fifth inquiry must also be answered in the negative inasmuch as it is required by Section 178, Constitution of Alabama 1901, that to entitle one to vote in any election, he must have resided within the State two years, the county one year, and the precinct or ward for three months immediately preceding the election in which he offers to vote.

As is well known, one cannot have two places of legal residence for voting purposes, and as has been heretofore pointed out when such question is in doubt, it is to be determined by the intention of the person concerned as expressed by his words and acts, and the strongest factor to be considered is the action of such person in maintaining his voting privilege in a certain place, by registration, payment of poll tax, and participation in elections therein.

It must, therefore, be assumed that the person mentioned by you in your fifth inquiry, by his retention of his voting privilege in the county of his former residence, has shown no intention of becoming a legal resident of Tuscaloosa County, but rather has indicated that it was his intention to retain such other county as his legal residence. Therefore, should such person on this date, or at any other date within three months prior to the election here concerned, change his intention as to the county of his residence, he would not be eligible to participate in any election therein until he had acquired the requirements of residency prescribed by Section 178, *supra*. This would of necessity mean that such person would not be eligible to participate in the election here in question as he could not possibly have attained the requirement of one year's residency in Tuscaloosa County by the date of such election.

I should also point out that to make one eligible for registration as an elector, he must prove to the satisfaction of the board of registrars that by the date of the next general election, assuming his place of residence to remain unchanged, he will possess the requirements of residency above stated. Section 181, Constitution of Alabama 1901, as amended. Therefore, should the person here considered now change his intention concerning the county of his legal residence, he would not be eligible for registration until after the date of the next general election. Opinion to the Honorable J. H. Sims, *supra*.

I must, therefore, answer your fifth inquiry to the effect that a person, such as that mentioned by you therein, would not be entitled to participate in the election of which you inquire. Cf. Opinion of this office rendered under date of September 16, 1948, to Honorable G. H. Stacy, Judge of Probate, Bibb County, Centerville, Alabama, a copy of which has been furnished to you.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1948

Hon. Ed. E. Reid
Executive Director,
Alabama League of Municipalities
Fourteen South Hull Street,
Montgomery, Alabama.

Municipal Corporations—Elections—Ballots.

There is no prohibition against the casting of a "single shot" ballot in general municipal elections, and such a ballot is to be legally counted and recorded.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 31, 1948, is as follows:

"A question has been propounded to me by one of our municipal officials as to whether it is necessary for a voter to vote for five candidates for the city council, where five are to be elected, for his ballot to be valid. In other words, in Alexander City five councilmen are to be selected, along with a mayor, in the September 20 election. Must a voter vote for five candidates for his ballot to be counted?

"I know that in state and county primary elections it is necessary to vote for as many candidates as there are places to be filled, for the ballot to be counted. I find no rule on this as to municipal general elections. It is the presumption of our counsel that since there is no provision of law requiring a voter to vote for as many candidates as there are council posts to be filled, that the ballot would be considered valid, if it met all other requirements, even if the voter voted for only two candidates for the council, or three, or any number less than five.

"I shall thank you to give me your opinion on this."

In my opinion, your request must be answered in the negative.

The type ballot to which you refer in your request is that commonly known as a "single shot" ballot, that is, a ballot upon which an elector, in voting for candidates for an office to be filled by more than one person, does not vote for the total number of candidates to fill such office, or offices, but votes for some number less than the total number. An example of such, as stated by you, might well arise in the general municipal election, wherein the electors of the various municipalities are to select five councilmen. You inquire as to whether a ballot cast by an

elector voting for less than five candidates for councilmen is a valid ballot.

Elections in those towns and cities operating under a councilmanic form of government are required to be held in accordance with the provisions of Act No. 465, General Acts 1945, page 699. Section 1 of this act provides that:

"Elections in cities and towns of this state shall be conducted according to the general election laws except as otherwise provided in this title. This title, however, shall not apply to cities and towns organized under a commission form of government."

It is, therefore apparent that if any prohibition exists relative to the casting of "single shot" ballots in general municipal elections, it must be found within the provisions of Act No. 465, supra, or within the general election laws of the State. I have carefully examined the provisions of Act No. 465, supra, and likewise the statutes comprising the general election laws of the State, and no such prohibition is to be there found.

It is true that Title 17, Section 361, Code of Alabama 1940, which statute pertains to primary elections alone, does contain an express prohibition against the casting of such a ballot, declaring that as to the particular office concerned, such ballot shall not be counted or recorded. However, this statute is applicable only to ballots cast in primary elections and could not be considered a prohibition against the casting of such a ballot in general elections, State, county, or municipal.

It is likewise of interest to note that Title 17, Section 97, Code of Alabama 1940, which statute prescribes the requirements of the voting machines to be used in elections in this State, provides by Subsection (s) of such statute that such machines must be so constructed and equipped with devices or attachments as to comply with the "single shot" provisions of the Alabama election laws, whenever and wherever such provisions are applicable at elections in this State, thereby indicating that such provisions are not applicable to all elections.

It is, therefore, my opinion that the absence of any prohibition against the casting of "single shot" ballots from the specific statutes governing general municipal elections and from the general election laws of the State is pertinent and that, no such prohibition existing, such a ballot cast in a general municipal election should be legally counted and recorded.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 21, 1948

Hon. W. O. Dobbins, Jr.,
Director,
State Planning Board,
102 Church Street,
Montgomery 4, Alabama.

Alabama State Planning Board—Contracts—Statutes—Act No.
183, General Acts 1943, page 163.

The Alabama State Planning Board has the right to contract with the University of Alabama for technical services under conditions stated in contract submitted by virtue of authority contained in Act No. 183, General Acts 1943, page 163.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 17, 1948, is as follows:

"The Alabama State Planning Board and the University of Alabama are considering a formal agreement whereby technical services in certain fields will be furnished to the State Planning Board by the University of Alabama.

"I shall appreciate your review of this proposed agreement and early advice from you on any legal points which may be involved."

You have accompanied your request for an official opinion with a copy of a proposed agreement between the Alabama State Planning Board and the University of Alabama, wherein the University contracts to furnish the Board technical services in certain fields. It is my opinion that said contract is valid in all legal aspects.

The declared purpose of the contract in utilizing said technical services may be summarized as a furtherance of the objectives for which the Alabama State Planning Board was created by the Legislature in Act No. 183, General Acts 1943, page 163.

Sections 1-3, inclusive, of the contract are quoted as follows:

"Section 1. Upon the signing of this agreement by both parties, the State Board agrees to pay to the University \$12,000 for the provision by the University of technical and consultative services, partial payments of this amount to be made monthly as expenditures are made by the University.

"Section 2. In return for the payment of the above sum, the University agrees to furnish the Board such services as may be requested by the Board; provided, however, that the time when such services may be made available, the personnel involved and the compensation shall be mutually agreed upon at least thirty days before such services are required.

"Section 3. Subject to the provisions of Section 2, the services to be provided shall be in such subject fields as:

- "1. Industrial planning and analysis.
2. Industrial development.
3. Water resources.
4. Community organization.
5. Special studies as may be necessary from time to time and determined by the State Board."

Further quotation of the aforementioned contract is deemed unnecessary to the discussions herein.

It is observed from the declared purpose of the contract and the terms thereof that the statute creating the Alabama State Planning Board and outlining its authority, has been closely adhered to. Act No. 183, General Acts 1943, page 163, at Section 5 thereof, reads in part as follows:

" * * * * * In general, the board shall have such powers as may be appropriate to enable it to fulfill its functions and duties to promote State planning and to carry out the purposes of this act. * * * * * The board shall have authority to: collect, compile, and distribute literature as to the facilities, advantages, and attractions of the State; the historic, recreational, and scenic points and places of interest within the State and its transportation and highway facilities; plan and conduct a program of information and publicity designed to attract new industries and tourists, and also encourage and coordinate the efforts of other public and private organizations or groups of citizens to publicize the facilities and attractions of the State for the same purpose; publicize the material and economic advantages including available labor supply, of the State which make it a desirable place for business or residence; and carry on such educational program as is necessary to familiarize the people of the State with the scenic, recreational, historic, industrial, and agricultural advantages or needs of the State. * * * * *

It is seen from this quoted portion of Section 5 that the statute and the declared purposes of the contract under consideration generally coincide.

Section 5, supra, is further quoted in part as follows:

" * * * * The board is further authorized and empowered, within the limits of available funds; to contract with agencies of any type or wherever situated that will tend to promote the objectives of this act; to enter into cooperative agreements and contracts with such individuals, partnerships, corporations, public or private associations, societies, educational institutions, chambers of commerce, automobile associations, and other organized groups as may be deemed advantageous and proper to effectuate the intent and purpose of this act, provided, however, that an authenticated copy of all such contracts shall be filed with the Department of Finance and shall be approved, as to legality, by the Attorney General; * * * * ." (Emphasis supplied.)

It is clear from the above that the Board has the right to contract with an educational institution for the purpose of attaining the objectives of its creation. You are therefore advised that the Alabama State Planning Board has the right to enter the contract submitted with the University of Alabama.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 21, 1948

Honorable James T. Beeland,
Judge of Probate,
Butler County
Greenville, Alabama.

Residence—Medical School—Scholarship.

1. A person who has established a legal domicile may change the same by abandonment and the establishment of a new domicile with the intention to remain at the newly established domicile.

2. Any resident of a county who has duly matriculated in a School of Medicine is entitled to the \$400.00 scholarship as provided by Act No. 89, General Acts 1943, page 89.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of July 29, 1948, is as follows:

"Your attention is invited to Section 6 of Act No. 89, General Acts 1943, page 89, which reads, in pertinent part, as follows:

"The Board of Trustees of the University of Alabama is hereby authorized and required to establish a scholarship for each county in the State of Alabama in the amount of four hundred dollars (\$400.00) per year for the benefit of one resident of each such county, payable from the annual appropriation to the School of Medicine. To be eligible for this scholarship a person shall be a young man or woman of good character and shall have been accepted for matriculation by the authorities of the School of Medicine in accordance with the current standards and requirements of said school, which standards and requirements in turn must in every way meet the requirement for an approved medical school as fixed by the Council on Medical Education and Hospitals of the American Medical Association and by the Association of American Medical Colleges. The beneficiaries of said scholarship in every instance shall be designated by a majority vote of the Board of Censors of the County Medical Society of the respective counties, subject to the approval of the board of revenue or court of county commissioners or other county governing body, however designated, of the respective counties. * * * * *

"A young man who was born and reared in Jefferson County and attended the public schools there, later entered the University of Alabama as a premedical student. While there, he volunteered in the Army of the United States during World War II, and, after his honorable discharge therefrom, returned to the University of Alabama to complete his premedical studies. While still a premedical student at the University of Alabama, he registered as an elector in Jefferson County, the county of his birth, on April 9, 1946. Shortly before, and while still a premedical student at the University of Alabama, he married a young lady who was born and reared in Butler County and who was at that time and still is a registered elector in Butler County. The marriage took place in Butler County.

"After their marriage, he continued his premedical studies at the University of Alabama and she resided with him during a portion of that time in Tuscaloosa, Alabama. In December, 1946, while still a premedical student at the University of Alabama, he decided to change his legal residence to Butler County, the county of his wife's birth and legal residence, and at all times since that date has considered Butler County to be the county of his legal residence. They had a child born in June, 1947, in Butler County, and his wife has actually resided in Butler County from time to time since the date of their marriage, only being absent from Butler County when she was temporarily residing with him at his temporary residence while he was a student, either in the Premedical School at the University of Alabama in Tuscaloosa, or at the Medical School of the University of Alabama in Birmingham. On January 5, 1948, he registered as an elector in Butler County and is on the list of qualified electors in Butler County today.

"Shortly after he completed his premedical studies at the University of Alabama, he was admitted to the Medical School of the University of Alabama, where he is now a student.

"Your official opinion is requested on the following questions:

"1. Was this young man entitled to register as an elector in Butler County on January 5, 1948?

"2. If he was so entitled to so register on that date, is he a legally qualified elector of Butler County today, inasmuch as he is exempted from the payment of poll tax as a veteran?

"3. Is he eligible for the scholarship established by Section 6, supra, from Butler County?"

Before proceeding to a categorical answer to the question propounded by you, I deem it advisable to state the general rule in regard to establishing a new domicile or residence.

In the case of *Pope v. Howell*, 227 Ala. 154, 149 So. 222, this rule is applicably stated as follows:

"* * * Domicile of the elector is a mixed question of law and fact, dependent upon the intention and acts of the elector. Cases illustrating such fact which may be consulted with profit are: In *Holmes v. Holmes*, 212 Ala. 597, 599, 103 So. 884, 886, the law of domicile is thus stated: 'A domicile once acquired is presumed to continue until a change, *facto et animo*, is shown. *Bragg v. State*, 69 Ala. 204. If there was a change, there must have been both an abandonment of his former domicile with no present intention to return, and the establishment of another place of residence with intention to remain permanently, or at least, for an unlimited time; the former may be inferred from the latter. *Allgood v. Williams*, 92 Ala. 551, 8 So. 722; *Caldwell v. Pollak*, 91 Ala. 353, 8 So. 546; *Young v. Pollak*, 85 Ala. 439, 5 So. 279; *Merrill v. Morrisett* (76 Ala. 433) supra.'"

This rule and the effect of the cases cited above may be stated in this manner: When the fact of a legal residence has once been established, such fact of residence is presumed to continue until it is established by evidence that the person has elected to, or has established a residence at or in another place. It may further be stated that the determination of the place of legal residence of any given person presents a question of fact, however, in determining this fact, the intention of the person is entitled to and must be given due consideration in connection with the acts of such person. It is the combined result of intention and acts that determines the residence of a person, when such person has previously established a domicile.

It now, therefore, becomes necessary to apply the facts and intention of the person here considered to the above rule.

It appears from your request that this person had established a residence in Jefferson County, Alabama, and registered to vote in that county on April 9, 1946. It further appears that said person, while a student at the University of Alabama, married a young lady who was a resident of Butler County. After this marriage, the wife of this person spent a considerable part of the time in Butler County, and he stayed from time to time in Butler County. It further appears that a child was born to this couple in Butler County, and the wife and child reside in Butler County at all times except when they are temporarily residing with the husband at the Medical School in Birmingham, Alabama.

It appears that this person decided to change his legal residence to Butler County in December, 1946, this intention being evidenced by the fact that his wife and child spent most of their time in that county, and he resided there while he was not in attendance at the medical school. This intention is further exemplified by the acts of this person, the most prominent of these acts being that he offered himself for registration and was registered as an elector of Butler County on January 5, 1948. In my opinion, his intention and acts clearly show that he has abandoned his domicile or residence in Jefferson County and has established a new place of residence in Butler County, with the intention of remaining there permanently, or, at least for an unlimited time. See opinion rendered to Honorable J. H. Sims, Judge of Probate, Bullock County, under date of April 19, 1948, and authority cited therein. W

Answering your questions categorically, you are advised that:

(1) In my opinion, this young man was entitled to register as an elector in Butler County on January 5, 1948. This for the reason that by his intention and act he has abandoned his residence in Jefferson County and established a new residence in Butler County.

(2) Since I have hereinabove answered your first question in the affirmative, it is my opinion that this young man is a qualified elector of Butler County at the present time, inasmuch as under the provisions of Section 194½ of the Constitution of Alabama 1901, as amended, this young man is exempt from the payment of poll tax.

(3) In answer to your third question, you are advised that, in my opinion, this young man is eligible for the scholarship established by Section 6 of Act No. 89, General Acts 1943, page 89, from Butler County. The requirements for eligibility of this scholarship being that the person must be a resident of the county and must be a young man or woman of good character and has been accepted for matriculation by the authorities of the School of Medicine in accordance with the standards and requirements of said school. My answer to your first and second questions established the fact that this young man is a resident of Butler County, and it appears from your request that he has met the standards and requirements for admission to the School of Medicine.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 22, 1948

Hon. W. H. Holcombe, Sr.,
Sheriff, Mobile County,
Mobile, Alabama.

Alabama Alcoholic Beverage Control Board—Intoxicating
Liquors.

1. The mere possession of intoxicating beverages by patrons of a restaurant in a "wet" county in Alabama is not illegal, if such intoxicating beverages have been legally purchased in a manner required by the Alabama Alcoholic Beverage Control Law.

2. It is not illegal in Alabama for the owner or proprietor of a restaurant to sell what is commonly known as "set ups" to his customers, or charge them a cover charge.

3. There is no statute which prohibits the legal possession of intoxicating beverages on Sunday.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of September 11, 1948, is as follows:

"Investigation by this Department discloses the following practices indulged in and conditions existing in connection with the possession and consumption of Alcoholic Beverages in this county:

"In a number of places having restaurant and soft drink licenses, but no beer or liquor license, where people congregate to dance, drink and eat we find alcoholic beverages in glasses and in bottles on the tables, on the floor under the tables, on chairs and otherwise in possession of the patrons.

"Very often we also find alcoholic beverages, beer and whiskey, under counters, in ice boxes, in back rooms, in concealed traps and otherwise stored in these same places.

"Usually the operator of the establishment sells the set-up, consisting of ice and some kind of soft drink, to the patron, or exacts a cover charge.

"We are not able to prove that the proprietor sells the liquor or beer to the patrons. The claim is always made by the proprietor or operator and the patrons that the customer provided his own liquor or beer.

"The beverages are apparently legal ABC goods.

"I would like to have your official opinion on the following questions:

"1. Is there a law on the Statute Books of Alabama making the above described practices a violation of the law?

"2. If there is no law prohibiting the described practices, does the Alabama Beverage Control Board have the power and authority to make a rule or regulation prohibiting such practices that will have the effect of law?

"3. In any event is it against the law for proprietors or patrons to indulge in such practices on Sundays?

"An early reply will be sincerely appreciated."

In answer to your first inquiry, I advise you as follows:

1. The mere possession of intoxicating beverages by patrons of a restaurant in a "wet" county in Alabama is not illegal, if such intoxicating beverages have been legally purchased in a manner required by the Alabama Alcoholic Beverage Control Law. The fact that the owner of the restaurant does not have a license to sell beer or liquors has no bearing on the question.

In the case of *Walls v. State*, 29 Ala. App. 466, 198 So. 151, the court said:

"It appears, * * * * * that the liquor involved in this prosecution was purchased from the State liquor store in Huntsville. Such liquor, therefore, was not 'liquors or beverages that are prohibited by law,' but on the contrary was 'legal liquor,' the possession of which was there permissible, in Madison—a 'wet'—County * * * * *"

See also *Harvey v. State*, 30 Ala. App. 216, 3 So. 2d 142.

2. It is not illegal in Alabama for the owner or proprietor of a restaurant to sell what is commonly known as "set ups" to his customers, or charge them a cover charge.

3. The storage of legally purchased intoxicating beverages by the owner or proprietor of a restaurant in his place of business in a "wet" county in any manner is not illegal, in the absence of proof of illegal sales or distribution of such beverages from his place of business.

In the case of *McPherson v. State*, 29 Ala. App. 278, 196 So. 739, the court said:

"The evidence is without dispute that the whiskey which defendant had in his car was not contraband in any manner, for it bore the proper State stamp on each of the bottles, and the occurrence took place in the City of Dothan, in Houston County, Alabama, and this court judicially knows that Houston is a 'wet' county, where properly stamped intoxicating liquors may be legally purchased, and likewise legally possessed. The possession of said liquor by defendant was not only presumptively legal, but was conclusively so, there being no evidence tending to show the contrary."

Whether or not the intoxicating beverages found or stored in a restaurant are the property of the proprietor of the restaurant, or the property of the patrons of the restaurant, has no bearing on the question.

In the case of *Lovett v. State*, 30 Ala. App. 334, 6 So. 2d 437, the court held that where the operator of a filling station who did not have a liquor license kept liquor which had been purchased from a State store and duly stamped and labeled for sale in a "wet" county, the liquor was subject to confiscation as "contraband," there being proof of recent sales and deliveries of liquor from the place of business of the operator of the filling station. This case, however, is not applicable, because you state in your inquiry that you are not able to prove that the proprietor of the restaurant sells liquor or beer to the patrons.

In answer to your second inquiry, it is my opinion that the Alabama Alcoholic Beverage Control Board is without authority to promulgate rules or regulations prohibiting the "practices" which you set out in your request.

It is without question that the Board has authority to make rules and regulations not inconsistent with the Alabama Alcoholic Beverage Control Law for the purpose of carrying out the provisions of said law, and that such rules and regulations have the effect of law (Title 29, Sections 6, 52, Code of Alabama 1940; *Lovett v. State*, supra). However, a rule or regulation promulgated by the Board prohibiting the possession of legally purchased alcoholic beverages in a "wet" county, or a rule or regulation providing for the confiscation of liquors duly purchased from a State store, would be inconsistent with the provisions of the law.

In answer to your third inquiry, there is no statute which prohibits the legal possession of intoxicating beverages on Sunday; nor is there a statute prohibiting the owner or proprietor of a cafe from selling "set ups" or charging cover charges to his customers on Sunday.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 23, 1948

Hon. L. R. Grimes, President,
Montgomery County Board of Revenue,
Montgomery 4, Alabama.

Counties—Municipalities—Health and Health Department.

1. When the State Board of Health finds that the construction of storm water sewers will promote the health of the State for the benefit of a county and its inhabitants, and requests a county governing body to appropriate funds for a storm water sewer, pursuant to the provisions of Title 12, Section 12, Subsection 19, Code of Alabama 1940, the fact that such storm water sewer will lie wholly within the corporate limits of a municipality within the county does not affect the authority of the county governing body to make an appropriation for such purpose.

2. Such appropriation may, in the discretion of the county governing body, be paid to the municipality, if the county governing body deems the municipality to be the proper agency to best facilitate the construction of such storm water sewer, in which event the money so appropriated must be expended by the municipality only for the purpose for which appropriated.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of September 20, 1948, is as follows:

"We respectfully request an official opinion from you, as Attorney General, on the following:

"1. May the Board of Revenue of Montgomery County make an appropriation of \$18,000.00 to the City of Montgomery, Alabama, to aid in the construction or for the construction of a storm sewer between Madison Avenue and Upper Wetumpka Road, in the City (municipality) of Montgomery, County of Montgomery, Alabama?

"2. If your opinion is that said appropriation may be made, may the Board of Revenue pay such appropriation to the City of Montgomery?

"For your information, the original of the enclosed letter from D. G. Gill, M. D., State Health Officer of the State of Alabama, has been received by the Board of Revenue.

"Your attention is called to an opinion of your office of September 8, 1948, addressed to Dr. D. G. Gill, State Health Officer, Department of Public Health.

"Your attention is respectfully called to an opinion of the Attorney General's Office at Page 611 of the Biennial Report of Attorney General of Alabama, Oct. 1, 1930 to Sept. 30, 1932, which said opinion was dated January 4, 1932 and addressed to the late Honorable W. W. Brandon, Judge of Probate, Tuscaloosa.

"We realize that your office is very busy but, if we may receive your opinion by Thursday morning, it will be deeply appreciated as the Board of Revenue meets Thursday afternoon to pass upon this appropriation, if authorized by your office."

In the opinion which I rendered to Dr. D. G. Gill, State Health Officer, Department of Public Health, Capitol, under date of September 8, 1948, I held:

"The authority of a county governing body to expend funds of the county for the construction of storm water sewers (such sewers not being constructed for the purpose of preventing damage to the public roads and bridges of the county) is contingent upon a request from the State Board of Health, pursuant to the provisions of Title 12, Section 12, Subsection 19, Code of Alabama 1940, which request can only be made by the State Board of Health if it finds that the construction of such sewers will promote or enforce the health and quarantine laws of the State for the benefit of the county and its inhabitants."

In the letter to you under date of September 9, 1948, the State Health Officer, acting for the State Board of Health, found that the construction of storm water sewers would promote the health of the State for the benefit of a county and its inhabitants, and, pursuant to Title 12, Section 12, Subsection 19, Code of Alabama 1940, requested your county governing body to appropriate sufficient funds to construct a storm water sewer between Madison Avenue and Upper Wetumpka Road in the city and county of Montgomery.

This request from the State Board of Health is sufficient to authorize your county governing body to make an appropriation for this purpose.

In my opinion, the mere fact that the proposed storm water sewer will lie wholly within the corporate limits of a municipality within the county does not affect the authority of the county governing body to make an appropriation for its construction.

Further, I am of the opinion that the appropriation for this purpose may be paid to the city of Montgomery, if your county governing body deems the city of Montgomery to be the agency to best facilitate the construction of this storm water sewer. However, in the event you make an appropriation for this purpose to the city of Montgomery, the money so appropriated must be expended by the city of Montgomery only for the purpose for which it is appropriated.

The opinion to which you refer in your letter of inquiry (Biennial Report of Attorney General, 1930-32, page 611), while dealing with a different statutory provision from that here considered, is apt and direct authority for the conclusions here reached.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 23, 1948

Honorable James S. Saliba,
Brigadier General, AGD,
Office of the Adjutant General,
State Military Department,
Montgomery 2, Alabama.

Alabama National Guard—Statutes—Act No. 626, General Acts 1947, page 478. Title 35, Sections 59 and 67, Code of Alabama 1940.

1. Where no National Guard Medical Officer is available to make physical examinations of National Guard enlistees a Unit Commander is not compelled to resort to the County Health Officer for the making of said physical examinations; on the contrary, said Unit Commander is authorized to have physical examinations made by any private physician or Reserve Medical Officer available and willing to perform the service, if and as authorized by the Adjutant General and pertinent military regulations duly promulgated.
2. Where there is a National Guard Medical Officer in the vicinity of the Unit, but the volume of physical examinations to be made is more than such Officer can handle, supplementary assistance in conducting physical examinations may be made by private physicians or Reserve Medical Officers under facts outlined.
3. The Governor has authority to authorize payment of \$2.00 for each physical examination made by physicians other than National Guard Medical Officers and County Health Officers for the period September 16, 1947 through November 16, 1947, out of the Active Military Service Appropriation under facts stated.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of August 25, 1948, is as follows:

"Re: Payments for Physical Examinations of National Guard Enlistees.

"Since the reorganization of the Alabama National Guard beginning in September, 1946, and up to the present time, it has been very difficult to recruit sufficient doctors to serve as Medical Officers in the National Guard units. Because of the scarcity of Medical Officers, and because all doctors have been so busy, it has been extremely difficult to arrange for physical examinations of the large number of National Guard enlistees. Recognizing this problem, the 1947 Session of the Legislature amended Section 80, Title 35, Code of Alabama 1940 by adding the following provisions:

"... In those localities in the state where there are or may hereafter be located National Guard units, and where no National Guard Medical Officer is available to pass upon the physical, mental fitness of officers or enlisted men, it shall be the duty of the County Health Officer, upon request of the unit commander, to make said physical examinations free of charge."

"During the period 16 September 1947—16 November 1947, the National Guard Bureau, Department of the Army, sponsored a national recruiting campaign known as 'Operation 88,888,' for the purpose of increasing the total National Guard strength a minimum of 88,888 officers and men. This Department, with the whole-hearted support of the Governor, energetically conducted a recruiting campaign which placed the Alabama National Guard among the national leaders in recruiting.

"To facilitate the carrying out of 'operation 88,888' in Alabama, and to secure prompt physical examinations of the enlistees recruited thereby, the Governor on 15 September 1947 authorized the payment of \$2.00 for each physical examination for enlistment purposes during the period of the campaign, same to be paid from the Active Military Service Appropriation (a copy of the orders authorizing this payment is attached hereto). In this connection attention is invited to Sections 39 and 185, Title 35, Code of Alabama 1940. A number of vouchers have been approved and paid covering payments to physicians for physical examinations pursuant to the Governor's authorization, and several other vouchers have been approved and submitted to the State Comptroller for payment but which have not been paid.

"The State Examiners have questioned the propriety of payments made to physicians for physical examinations, as authorized above, in view of the language of Section 80, Title 35, Code of Alabama 1940 quoted above. As a result the State Comptroller is withholding payment upon the additional vouchers which have been presented to him for this purpose. The State Examiners expressed the opinion that the above cited Code provision requires that any physical examinations not made by National Guard Medical Officers must be made by the

County Health Officer, and without cost, and consequently that payments cannot be made to physicians (who are not National Guard Medical Officers, nor County Health Officers) for such physical examinations.

"Your opinion is requested as to the following questions arising because of the above Code provision:

"a. Where no National Guard Medical Officer is available to make a physical examination, is a unit commander compelled to resort to the County Health Officer for the making of a physical examination, or is he authorized to arrange for the making of physical examinations by any private physician or Reserve Medical Officer available and willing to perform such service, if and as authorized by the Adjutant General and pertinent military regulations?

"b. Where there is a National Guard Medical Officer in the vicinity of the unit, but the volume of physical examinations to be made is more than such officer can handle, does the above Code provision prevent the making of arrangements of supplementary assistance in making such examinations by private physicians or Reserve Medical Officers?

"c. Did the Governor have authority to authorize payments for physical examinations during the above mentioned period, payable out of Active Military Service Appropriations?

"Your early advices in this matter will be greatly appreciated in order that prompt payments can be made by the State Comptroller on the remaining vouchers covering services rendered in accordance with the Governor's special authorization during the above mentioned recruiting program."

Section 7 of Act No. 626, General Acts 1947, page 478, amends Title 35, Section 80, Code of Alabama 1940, which Code Section relates to the tests of fitness for officers in the Alabama National Guard. The effect of the amendment is to extend the requirements of physical fitness to enlisted personnel as well as officers. In addition, the following provision is made:

"* * In those localities in the state where there are or may hereafter be located national guard units and where no national guard medical officer is available to pass upon the physical, mental fitness of officers or enlisted men, it shall be the duty of the county health officer, upon the request of the unit commander, to make said physical examinations free of charge."

This latter amendatory provision makes it mandatory for the County Health Officer, upon proper request, to conduct physical examinations of National Guard personnel without charge. However, I observe nothing

in the aforementioned statute restricting physical examinations solely to the two named classes of physicians contained therein, i.e., National Guard Medical Officers and County Health Officers. The latter provision of said statute requires the County Health Officer to perform such a duty when the National Guard Medical Officer is unavailable and he is called upon to do so.

It is my opinion that the Legislature merely intended to direct County Health Officers to assist in the making of physical examinations when called upon to do so in order to facilitate the conducting of said examinations, and that the enactment of Section 7 of Act No. 626, supra, was not intended to restrict physical examinations solely to National Guard Medical Officers and County Health Officers.

Title 35, Section 59, Code of Alabama 1940, states that the Governor shall be Commander in Chief of the State Militia, and reads in part as follows:

"* * * The governor of Alabama is authorized and empowered to do and perform any and all acts, and to make and publish all such rules and regulations as he may deem necessary to effect organization or reorganization of the national guard and naval militia of Alabama in conformity with the provisions of the national defense act and federal laws relating to the naval militia, * * * ."

In addition, Title 35, Section 67, Code of Alabama 1940, relating to the function of the Adjutant General, reads in part as follows:

"* * * The adjutant general shall, from time to time, prepare and publish, by order of the governor, such orders, rules and regulations consistent with the law as are necessary to bring the organization, armament, equipment, training and discipline of the various classes of the militia of Alabama to a state of efficiency as nearly as possible to that of the United States army and navy. * * * * * He shall perform such other duties as may be required of him by the commander-in-chief, and the comptroller of Alabama shall draw warrants on the treasury for all expenses incurred under this section on bills regularly presented to, and approved by, the governor. * * * * *"

The aforementioned statutes invest full authority in the Governor to increase the strength of the Alabama National Guard under such a plan as outlined, and, in my opinion, give rise to a justification of the payment of a \$2.00 bill for each physical examination made for enlistment purposes. A \$2.00 fee for a physical examination by a qualified private physician certainly appears reasonable and a proper item of expense necessary to the enlistment program under the facts stated. Such an item of expense, in my opinion falls within the category of "expenses incurred" in organization and is a proper charge to the active military service. Without said physical examinations it is obvious that under the facts stated a National Guard strength of 88,888 men in active service could not have been

attained within the proposed time. Such an expense must, therefore, in my opinion, be considered a proper charge against the Active Military Service Appropriation fund when so ordered by the Governor.

Special Order No. 178 which you have attached to your request for an official opinion, is signed by the Adjutant General by direction of the Governor. It states the purpose of the order as relating to an increase of National Guard strength to a minimum of 88,888 men, and authorized a payment from the Active Military Service Appropriation fund of \$2.00 for each physical examination made during the period September 16 through November 16, 1947. This order appears duly promulgated in every respect and specifically complies with the authority contained in Sections 59 and 67, *supra*.

Your questions are, therefore, categorically answered as follows:

(a) Where no National Guard Medical Officer is available to make physical examinations of National Guard enlistees a Unit Commander is not compelled to resort to the County Health Officer for the making of said physical examinations. On the contrary, said Unit Commander is authorized to have physical examinations made by any private physician or Reserve Medical Officer available and willing to perform the service, if and as authorized by the Adjutant General and pertinent military regulations duly promulgated.

(b) Where there is a National Guard Medical Officer in the vicinity of the Unit, but the volume of physical examinations to be made is more than such officer can handle, supplementary assistance in conducting physical examinations may be made by private physicians or Reserve Medical Officers under the facts outlined.

(c) The Governor has authority to authorize payment of \$2.00 for each physical examination made by physicians other than National Guard Medical Officers and County Health Officers for the period September 16, 1947 through November 16, 1947, out of the Active Military Service Appropriation fund under the facts stated.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 24, 1948

Dr. D. G. Gill,
State Health Officer,
Department of Public Health,
C A P I T O L.

Health—County Health Officers.

There is no authority of law to expend public funds to pay premiums on liability insurance designed to protect county health officers against claims and suits based upon malpractice, negligence, etc. in the performance of their duties as such county health officers.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 13, 1948, is as follows:

"May public funds cover the premium on liability insurance designed to protect county health officers and their assistants against claims or suits based upon malpractice, error, negligence or mistake, breach of implied contract, loss of services, personal restraint, the dispensing of drugs or medicine, assault, slander, libel, or undue familiarity? By public funds in this instance is meant those constituting the budgets of county health departments contributed by the State of Alabama and the several counties."

My answer to your inquiry is in the negative.

It is a well known principle of law, that before any public funds can be expended by an administrative board, either expressed or implied authority must be granted in the statute creating such board, authorizing the expenditure for any given purpose.

This rule is applicably stated in the case of *Woodruff v. Beeland*, 220 Ala. 652, 127 So. 235, as follows:

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred.

"No such power is implied unless an intention to confer it can be seen from the entire scheme of legislation; implied because incident to, and embraced within, express powers."

A diligent search of the statutes dealing with county health officers, which are found in Chapter 1 of Title 22, Code of Alabama 1940, does not reveal even a slight implication that public funds may be spent to procure liability insurance to protect the county health officers and their assistants against claims or suits of malpractice, error, negligence, mistake, assault, slander, libel or undue familiarity in the performance of their duties as such county health officers.

It, therefore, necessarily follows that in the absence of any expressed or implied authority in the statutes dealing with county health officers authorizing the State Board of Health to expend public funds for this purpose, such funds may not be expended in procuring the liability insurance mentioned in your request.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 27, 1948

Hon. George H. Jones, Jr.,
Register, Circuit Court,
Montgomery County,
Montgomery 1, Alabama.

Guardians—Administrators—Investment of Funds.

Under the provisions of Title 58, Section 47, Code of Alabama 1940, a guardian or administrator or other person acting in the fiduciary capacity may not invest funds committed to his charge in bonds or other interest bearing obligations of a state other than a general obligation of the state.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of June 4, 1948, is as follows:

"Re: Legal Investments of Trust Funds by Fiduciaries.

"Code of Alabama, Title 58, Section 47, reads in part as follows:

"47. Legal Investments of Trust Funds by Fiduciaries:

“ * * * * * (c) Bonds or other interest bearing obligations of any State of the United States of America. (d) General obligation bonds pledging the full faith and credit of any county of the State of Alabama * * * * *. (e) Interest bearing General obligations pledging the full faith and credit, including interest bearing warrants, of any board of education of any county or municipality of the State of Alabama * * * * *.”

“Will you kindly render me an opinion as to whether or not the investment by a guardian or administrator in obligations of a state other than Alabama and other than general obligations of that state or subdivision therein would be considered a legal investment under Title 58 of the Code as above set forth.”

In reply to your request, you are advised that, in my opinion, guardians, administrators or other persons acting in a fiduciary capacity in investing funds entrusted to them in obligations of other states must invest such funds only in general obligation bonds of the state or other general interest bearing obligations thereof.

The above conclusion is based on the language used in Title 58, Section 47, Code of Alabama 1940 (which you set out in your request), and particularly Subsection (c) thereof. This subsection provides that administrators, guardians, etc. may invest funds committed to their charge in “Bonds or other interest bearing obligations of any state of the United States of America.” A diligent search of the authorities of this state, as well as other states, does not reveal that this provision or similar provisions of statutes of other states has ever been held to restrict such investments to general obligations. I have also made an extensive study of the various text books on the subject of investment of trust funds, and they do not reveal that such investments are restricted to general obligations of the various states. As a matter of fact, the authorities, as well as the text books, are silent on the subject. Accordingly, therefore, I must base my conclusion on the commonly used and understood meaning of the words “bonds or other interest bearing obligations of any state.”

I have contracted the trust departments of several of the larger banks throughout the state and they advise me that they have for many years considered this provision in Section 47, supra, to include only general obligations of the several states. I have further been advised by these trust departments, as well as by several bond firms, that they have never seen or heard of a bond or other interest bearing obligation issued by a state as such, that was not a general obligation bond or interest bearing obligation thereof. In other words, it appears that the several states use the utmost care and pains to maintain an A-1 credit rating, and for this reason they do not indulge in the practice of issuing bonds or other obligations that are not general obligations. It is to be noted that the legislature was very careful in restricting such investments to general obligations of the several counties of the state and also in regard to investments in interest bearing warrants of county or city boards of educa-

tion. The legislature specifically limited such investments to general obligations of such bodies.

It is, therefore, my opinion that the legislature, when this statute was first enacted, took cognizance of the fact that the several states throughout the nation did not issue any other type of bonds in their names other than general obligation bonds, and for this reason there was no necessity for inserting the word "general" where the word "bonds" appears in Section 47, *supra*. I think that the legislature has accepted the meaning of the word "bonds" to be general obligations, and it was the intent of the legislature to restrict such investments in state bonds and other interest bearing obligations of the several states to general obligations, and you are so advised.

What I have hereinabove said applies to bonds of the State of Alabama, as well as to the other several states.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 27, 1948

Hon. Gordon Persons, President,
Public Service Commission,
State of Alabama,
C A P I T O L.

Public Service Commission—Motor Carriers—Lumber—Exemptions.

Railroad cross-ties, treated or untreated, are "lumber" within the meaning of Section 2A(3), "Alabama Motor Carrier Act of 1939," and therefore their haulage by motor vehicle for a distance not exceeding 75 miles is exempt from regulation by the Public Service Commission.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of September 20, 1948 is as follows:

"Will you please give us your formal opinion on the following matter. Section 2, paragraph 2 of the 1939 Motor Carrier Act, lists, among other items of exempted commodities, logs, lumber, poles and pulpwood when transported for a distance of not exceeding 75 miles.

"The Commission has received complaints from manufacturers making railroad cross ties, both treated and untreated ties, that such are being transported by individuals who do not have a certificate from the Public Service Commission.

"The question is, therefore, are railroad cross ties either treated or untreated to be considered as exempted items. Obviously, a cross tie is not a log in the commonly accepted terms of the word, it is not a pole, nor is it pulpwood. On the other hand, a railroad cross tie is a wood product, but whether it should be classified as "lumber" is another matter. It is a finished product and, of course, generally speaking it takes a different classification.

"Will you please advise us, therefore, if a motor carrier engaged in the hauling of railroad cross ties, treated or untreated, for hire, is subject to the jurisdiction of the Public Service Commission, or if they are exempt under Section 2, Paragraph 3 of the 1939 Motor Carrier Act."

Act No. 669, General Acts 1939, page 1064, known and cited as the "Alabama Motor Carrier Act of 1939," under Section 2A(3) thereof provides in pertinent part as follows:

"This Act shall not be construed to apply to: * * *; also motor vehicles if engaged in hauling milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales or cotton seed, for a distance not exceeding 75 miles, * * * * *"

Your inquiry, therefore, raises the question whether railroad crossties may properly be considered "lumber" within the meaning of Section 2A(3), supra. If so, their haulage by motor carrier for a distance not exceeding 75 miles is exempt from regulation by your Commission.

The term "lumber" is sometimes used in a broad sense as including both the manufactured and unmanufactured product, but its more restricted meaning is timber sawed into merchantable form, or the manufactured product of logs. 54 *Corpus Juris Secundum* 673; *Craddock Mfg. Co. v. Faison*, 138 Va. 665, 123 S. E. 535; *Dutch v. Anderson*, 75 Ind. 35; *Williams v. Stevens Point Lumber Co.*, 72 Wisc. 487, 40 N. W. 154. It has been judicially defined as "any timber sawed or split for use, whether by maul, wedge, or the use of machinery in a mill; anything manufactured out of a log with saw, ax, maul, wedge, or machine, for building houses, bridges, fences, or railroads; after the product leaves the log for commercial use, if it is suitable to use for any of these purposes, it may be denominated 'lumber' as the word is used in this country." *American Tie and Timber Company v. Kansas City Southern Railway Company*, 99 C. C. A. 44, 175 Fed. 28.

Accordingly, in the above cited case a federal court held that the classification of railroad crossties in a different class from "lumber,"

imposing upon them a higher rate, constituted unjust discrimination. For our purposes, the decision is significant in that the tariffs, under which the defendant's contract was made, quoted no specific rate on crossties. While a contrary conclusion was reached in *Greason v. St. Louis, I. M. & S. Ry. Co.*, 112 Mo. App. 116, 86 S. W. 722, in the latter case the defendant's tariff sheet did not include crossties as "lumber."

While the precise question has not arisen in the courts of our own state, I find that a Western court has held that railroad crossties, sawed at a sawmill in the same manner as other lumber, are "lumber" within the meaning of a statute referring to "lumber," and not "other timber" within the meaning of a succeeding statute. *Abernathy v. Peterson*, 38 Idaho 727, 225 Pac. 132.

Supplementary to your written request, I am advised by you that the motor carrier tariffs on file with your commission contain no separate rate for crossties, which carry the same rate as lumber. Therefore, I am of the opinion that railroad crossties, whether treated or untreated, fall within the definition of "lumber," as used in Section 2A(3), *supra*, and that their haulage by motor carrier for a distance not exceeding 75 miles is exempt from regulation by your Commission.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 30, 1948

Honorable Ralph P. Eagerton,
Chief Examiner,

Department of Examiners of Public Accounts,
C A P I T O L.

State and State Departments—Finance Department—Merit
Systems—Salaries—Statutes.

Under the provisions of Title 55, Section 304, Code of Alabama 1940, the chiefs of the divisions of the Department of Finance may legally be paid salaries in excess of \$4500.00 per annum, provided such salaries are so fixed under a pay plan adopted by the State Personnel Board, and approved by the Governor, the provisions of Title 55, Section 71, Code of Alabama 1940, to the contrary notwithstanding. However, such salaries must be limited to \$5700.00 per annum in accordance with Title 41, Section 152, Code of Alabama 1940.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of July 6, 1948, is as follows:

"It is to be noted that certain Chiefs of Divisions of the Department of Finance are being paid monthly amounts, representing salaries, such amounts being at a rate greater than \$4500.00 per annum.

"Attention is called to Section 71, Title 55, Code of Alabama, 1940, wherein such salaries are limited to forty-five hundred dollars per annum, such limitation being brought forward from the Finance Department Act of 1939 in General Acts of Alabama, 1939, page 161. It is also noted that in accordance with Section 72, Title 55, Code of Alabama, 1940, that the Chiefs of the Divisions of the Finance Department shall be subject to the Merit System. Also, in making reference to the Merit System Act and the Finance Department Act of 1939 it was noted that the Merit System Act was approved March 2, 1939 while the Finance Department Act of 1939 was approved March 7, 1939, as shown in General Acts of Alabama, 1939, on pages 86 and 164.

"In an opinion dated April 22, 1940 from the Attorney General to Hon. I. J. Browder, State Personnel Director, it was held that full authority to set the salary of the Secretary of the Alabama Pension Commission was vested in the State Personnel Board even though Act 483, S 314, approved September 16, 1939 (General Acts 1939, p. 684) provided that a definite amount for salary be paid. In this opinion it was held in part as follows:

"Premises considered, it is my opinion that the legislative intention becomes apparent when the provisions of all the above cited statutes are construed together, and that the provisions of Act No. 483, S 314, supra, which provides that the salary of the Secretary of the Alabama Pension Commission shall be \$1800.00 per annum is controlled by the provisions of Act No. 552, S 338, cited supra, in which it is provided that the provisions of the Merit System Act, approved March 2, 1939, shall be applicable to all state officers and employees covered thereby at the time of its enactment, any other statutes or provisions of law subsequently enacted to the contrary notwithstanding.'

"In view of the above it is to be noted that it is not shown that Act 552, S 338, was brought forward into the Code of Alabama of 1940. In this connection attention is called to an opinion of the Attorney General, dated July 18, 1941, that is addressed to Hon. John C. Curry, Commissioner of Revenue, which is in part as follows:

"Since there is here involved the construction of a provision of a code, it must be first observed that it may now be accepted as settled by law that a code is not a mere compilation of laws previously existing, but is "a body of laws duly enacted, so that laws which previously existed ceased to be law when omitted from said code, and additions which appear therein become the law from the approval of the act adopting the code." *State v. Towery*, 143 Ala. 48, 39 So. 309; *Bush v. Greer*, 235 Ala. 56, 177 So. 341.'

"Attention is also called to Section 152, Title 41, Code of Alabama 1940, which is here set out:

"152. Amounts of salaries.—When not fixed by law or provided for in the pay plan of the merit system, the governor is authorized to fix or approve salaries of officers and employees of the State of Alabama, but no salary or compensation, including those provided for in the pay plan of the merit system, shall be fixed or approved in excess of five thousand seven hundred dollars per annum unless a different maximum is fixed by law. (1939, pp 139, 870)"

"In connection with the above section of law reference is made to an opinion of the Attorney General, dated March 25, 1948, addressed to Dr. D. G. Gill, State Health Officer, in which interpretation is given to the above section of law. The pertinent part of such opinion is here quoted:

"Let us first consider carefully the provisions of Section 152, supra, which is composed of one sentence of two clauses. The first clause provides that when the salary of an officer or employee of the State of Alabama is not fixed by law or provided for in the pay plan of the State merit system, the Governor is authorized to fix or approve the same. Thus, this clause deals with salaries of officers and employees of the State of Alabama fixed in three manners:

"1. By law.

"2. By the pay plan of the State merit system.

"3. By the Governor."

"It is to be noted that Section 71, Title 55, Code of Alabama 1940, specifically sets out that the salaries of the Chiefs of the Division of the Finance Department shall not exceed forty-five hundred dollars per annum. With further reference to the above mentioned opinion the following is quoted from said opinion:

"It is a well known principle of statutory construction that where there is a general provision of law dealing with a general subject and a special provision of law dealing with a specific subject, the special provision will be construed as an exception to the general law and, therefore, controlling; or, stated differently, that if there is an apparent conflict between a general provision of law dealing with a general subject and a special provision of law dealing with a specific subject the general provision will yield to the special, and both will be given effect so as not to conflict. *Herring v. Griffin*, 211 Ala. 225, 100 So. 202; *Downing v. City of Russellville*, 241 Ala. 494, 3 So. 2d 34; *State v. Elliot*, 246 Ala. 439, 21 So. 2d 310."

"In accordance with the above it would appear that the specific provision for pay as set out in Section 71, Title 55, Code of Alabama, 1940, would control.

"Attention is called to an opinion or letter from the Attorney General, dated August 6, 1946, addressed to Honorable Ben C. Morgan, Director of Conservation. Such letter or opinion is not found published in the Quarterly Reports of the Attorney General for the period covering the above date. In this opinion or letter it was held that 'It is my opinion that the pay plan adopted in accordance with provisions of the Merit System controls the rate of compensation for state employees within the system, * * * *'. This was in answer to an apparent request from Honorable Ben C. Morgan, Director of Conservation, his inquiry being as follows:

"The Act creating the Department of Conservation and its various divisions placed a limitation on the salaries of the chiefs of the divisions of \$4500.00 a year. The Act creating the Merit System charges the Board with the duty of setting salary scales.

"Please give me your opinion as to whether the authority of the Merit Board takes precedence over the Conservation Act. In other words, can the Merit Board set a higher salary scale for the chiefs of the divisions of the Department of Conservation?"

"It is to be noted that the letter or opinion referred to above was addressed to and directed to Honorable Ben C. Morgan, Director of Conservation. Attention is called to Section 241, Title 55, Code of Alabama, 1940, and the footnote at the end of such section wherein it is stated 'As stated in *Holcombe v. Mobile County*, 26 Ala. App. 161, 155 So. 638, and in *Hill Gro. Co. v. State*, 26 Ala. App. 302, 159 So. 269, written opinions of the attorney-general are not controlling. They are merely advisory and, under this section, such opinions operate only to protect the officer to whom it is directed from liability because of any official act performed by such officer as directed or advised in such opinion. *Broadfoot v. State*, 28 Ala. App. 260, 182 So. 411.'

"In view of the above it is respectfully requested that you give me an opinion as to whether the chiefs of the divisions of the Finance Department can or cannot legally be paid salary in excess of \$4500.00 per annum."

In answer to your inquiry, it is my opinion that the chiefs of the division of the Department of Finance may legally be paid salaries in excess of \$4500.00 per annum, provided such salaries are so fixed under a pay plan adopted by the State Personnel Board, and approved by the Governor. However, such salaries shall not be in excess of \$5700.00 per annum.

Your inquiry is not without difficulty due to the apparent conflict in the Code sections involved. A proper statutory construction of the various Code Sections under consideration, in the light of their legislative history, is required to determine the true legislative intent. When doubt and ambiguity result from codifying statutes, the court will refer to the original enactments and give effect to their provisions as originally framed, notwithstanding a change in the phraseology, unless a clear intention is manifest to change their operation and effect.—*Griffin v. Fowler*, 17 Ala. App. 44, 81 So. 426; *Ex Parte Fowler*, 203 Ala. 98, 82 So. 112; *State ex rel. Fowler v. Stone*, 237 Ala. 78, 185 So. 404.

The Merit System Act was originally adopted by Act No. 58, General Acts 1939, page 68, approved March 2, 1939. Section 13 thereof made provision for a pay plan applicable to all employees in the State service. Sections 39 and 40 of said act provided as follows:

"Section 39. REPEALING CLAUSE. All laws or parts of laws inconsistent or in conflict with this Act are hereby expressly repealed, subject to the provisions of Section 40 hereof. Specifically and again without limiting the generality of the above, all laws or parts of laws the effect of which is to prescribe a different method of selection or appointment or to fix tenure of office or employment and the rate of compensation for services contrary to the express or implied effect and provisions hereof are repealed, it being the legislative intent that the terms of this act shall be fully effective, any law or parts of laws heretofore enacted to the contrary notwithstanding.

"Section 40. EFFECTIVE DATES. This act shall become effective immediately upon its enactment, provided, however, that a period of twelve months shall be allowed in which to organize and prepare for the administration of the Merit System herein provided, and that during such period of twelve months the employees and appointees of the State shall continue in all respects under and subject to the laws to which they are now subject."

In upholding the constitutionality of the Merit System Act, our Supreme Court, in the case of *Heck v. Hall*, 238 Ala. 274, 190 So. 280, decided June 29, 1939, observed as follows:

"* * * In the outset it may be stated that the entire Act is highly remedial, and should be liberally and favorably treated and construed with reference to the evils it was intended to curb, and the highly beneficent aims that inspired its adoption. *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809.

" * * * * *

"It is to be noted that the Merit System Act carries with it the following repealing clause: 'All laws or parts of laws inconsistent or in conflict with this Act are hereby expressly repealed, subject

to the provisions of Section 40 hereof. Specifically and again without limiting the generality of the above, all laws or parts of laws the effect of which is to prescribe a different method of selection or appointment or to fix terms of office or employment and **rate of compensation** for services contrary to the express or implied effect and provisions hereof are repealed, it being the legislative intent that the terms of this Act shall be fully effective, any law or parts of laws heretofore enacted to the contrary notwithstanding.'

" 'A repealing clause will be given effect according to its express terms, even to the repeal of a special or local law.' Tucker v. McLendon, 210 Ala. 562, 98 So. 797; Maxwell v. State, 89 Ala. 150, 7 So. 824; State ex rel Bibb v. Town of Warrior, 181 Ala. 642, 62 So. 69; Fidelity & Deposit Co. of Maryland v. Farmers' Hardware Co. et al, 223 Ala. 477, 136 So. 824; Allgood v. Sloss-Sheffield Steel & Iron Co., 196 Ala. 500, 71 So. 724.

"We may here say, and point out for the proper guidance of those charged with the duties of carrying into effect the Merit System Act, that while the Act confers upon the Personnel Director, and the State Personnel Board, with the approval of the Governor, the authority to fix and establish a 'pay plan' for all employees in the state service, to include for each class a minimum and maximum rate of pay, and such intermediate rates as the Director considers necessary or equitable, nevertheless in the establishment and enforcement of such 'plan,' Section 281 of the Constitution cannot be overlooked or disregarded. * * * "

It might here be noted that a maximum salary limitation of \$5700.00 per annum for State officers and employees was fixed by Act No. 107, General Acts 1939, page 139, approved March 3, 1939, and by Act No. 550, General Acts 1939, page 870, approved September 19, 1939, the latter act specifically incorporating therein the Merit System Act.

The Department of Finance Act of 1939 became law under Act No. 112, General Acts 1939, page 144, approved March 7, 1939. Section 27 thereof placed a maximum salary limitation of \$4500.00 per annum upon the salaries of the division chiefs of the Department of Finance. Section 29 of said act provided as follows:

"Section 29. APPLICATION OF MERIT SYSTEM ACT. Anything in this Act to the contrary notwithstanding, all employees and officers of the Department of Finance (including the chiefs of divisions but not including the Director of Finance) shall be subject to the provisions of any law now existing or hereafter enacted with respect to the method of selection and classification of State employees on a basis of merit."

It is my belief that Section 29, above quoted, nullified the \$4500.00 per annum maximum salary limitation, as it in effect made all employees

of the Finance Department (including chiefs of divisions) subject to the provisions of the Merit System Act. Moreover, in order to dispel any doubt in this respect, and in respect to other enactments subsequent to the Merit System Act which fixed maximum salary limitations of State employees, the same 1939 Legislature enacted Act No. 552, General Acts 1939, page 872, approved September 19, 1939, Section 1 of which provides as follows:

"Section 1. That all provisions of the Merit System Act, approved March 2, 1939, shall be applicable to all of the State Officers and employees covered thereby at the time of its enactment, any other statutes or provisions of law subsequently enacted to the contrary notwithstanding."

As of the date of the adoption of Act No. 552, *supra*, it is apparent that all State officers and employees, to which the Merit System Act was originally applicable, were then subject to the provisions of said Act, except those protected by constitutional provisions. This is in accordance with the enunciations in the case of *Heck v. Hall*, *supra*; Cf. Quarterly Report of Attorney General, Volume 19, pages 80 and 147. This was the status of the situation in regard to the applicability of the pay plan, adopted by the State Personnel Board and approved by the Governor, to State officers and employees at the time of the adoption of the Code of Alabama 1940. This Code was in the process of preparation at the time of the adoption of the enactments under consideration. It was adopted under the provisions of Act No. 628, General Acts 1939, page 995, approved July 2, 1940, and became effective and operative under the Governor's Proclamation on May 31, 1941.

The Merit System Act was carried forward into the Code of Alabama 1940 as Title 55, Chapter 9 (Sections 293-327). Section 13 of said act, *supra*, relative to the pay plan, appears in the Code as Title 55, Section 304, in the verbatim language as originally enacted and covers all employees in the State service.

The Department of Finance Act of 1939 was carried forward into the Code of Alabama 1940 as Title 55, Chapter 4 (Sections 60-170). Title 55, Section 71, places a maximum salary limitation of \$4500.00 upon the salaries of chiefs of divisions as did Section 27 of Act No. 112, *supra*. Likewise, Title 55, Section 72, provided that all employees and officers of the Department of Finance, including the chiefs of divisions, shall be subject to the Merit System, as did Section 29 of Act No. 112, *supra*.

The provisions of Act Nos. 107 and 550, relative to the overall maximum salary limitation of \$5700.00 per annum, were incorporated in the Code of Alabama 1940 as Title 41, Section 152.

Thus, immediately prior to the adoption of the 1940 Code we have the express will of the Legislature conveying to the State Personnel Board, with the approval of the Governor, the power to regulate the

compensation of State employees within the Merit System; and since the repealing clause of the Merit System Act was extended twelve months from the effective date of the act and up to March 2, 1940 and since the Code of 1940 was approved July 2, 1940, it would be frivolous to say that there was any change of intent during this interim while the Legislature was still in session. It would be equally frivolous to assume any change of intention by reason of the fact that the repealing sections of the Merit System Act (Sections 39 and 40, *supra*) were not carried forward into the 1940 Code for no such sections involving laws of a general nature were carried forward. The same is true with reference to Act No. 552, *supra*, as this act had served its purpose.

In view of the foregoing, it is my opinion that it was the intention of the Legislature in the adoption of the Code of Alabama 1940 that all State employees shall be subject to the pay plan adopted and approved by the State Personnel Board, any specific salary limitation set forth in the Code to the contrary notwithstanding, except the \$5700.00 limitation in Title 41, Section 152, *supra*, which specifically includes those provided for in the pay plan of the Merit System. The apparent conflicts in some instances were evidently inadvertences on the part of the Code Committee. The overall picture, in my judgment, in the light of the legislative history, court decisions, and administrative construction, shows that the Legislature intended that the law should be administered in accordance with this conclusion.

The above view is strengthened by the fact that my predecessor in office rendered an opinion (although in letter form and not published, but nevertheless an opinion of the Attorney General) to Honorable Ben C. Morgan, Director of Conservation, under date of August 6, 1946, holding in accordance with the above. This opinion acted as a protection to any public official who acted in accordance therewith, although not addressed directly to such official.—Quarterly Report of the Attorney General, Vol. 1, page 276. Said opinion was also to the same effect as the interpretation given to the statutes under consideration by the officials of the Department of Finance since the enactment of the Merit System Act and after the adoption of the Code of Alabama 1940. The Legislatures of 1943, 1945, or 1947 did not declare a contrary intent.

While administrative construction of statutes is not controlling, it should be given great weight in regard to a judicial interpretation thereof. 18 Alabama Digest—Statutes—Key No. 219.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 30, 1948

Honorable H. R. Summer,
Mayor, City of Decatur,
Morgan County,
Decatur, Alabama.

Municipalities—Officers and Offices.

1. When an officer elect dies before the beginning of the term of office to which he had been elected, his death creates a vacancy in said office for said term.

2. In cities having a population of six thousand or more, if the city council has adopted an ordinance or resolution to that effect, by two-thirds vote thereof, more than six months prior to any general municipal election, the city council of said city shall consist of five aldermen to be elected from the city at large.

3. In such a city, in the event of a vacancy from any cause, in the office of mayor, there being no other way provided by law for the filling of the vacancy, the Governor appoints a qualified person to fill the unexpired term of such office.

Opinion by Assistant Attorneys General Garrett and Hardin.

Dear Sir:

Your telegram of September 24, 1948, confirmed by letter, reads as follows:

"In the municipal election held in the city of Decatur on September 20, Mr. T. R. Harrison was elected mayor for the term beginning October 4, 1948. The city council met on September 21, 1948, and canvassed the returns which showed the election of Mr. Harrison. Mr. Harrison died this morning. Will you please give us your official opinion for the guidance of the city officials how the office of mayor for the term beginning October 4, 1948, is to be filled?"

By telegram of September 27, 1948, also confirmed by letter, you furnished me with the following additional information:

"On March 16, 1944, the city council of the city of Decatur unanimously adopted a resolution reading in part as follows: 'That the city council of the City of Decatur shall consist of five aldermen to be elected from the city at large as provided in Section 426 of Title 37 of the Code of Alabama of 1940.' The city council had previously unanimously adopted Ordinance Number 238A on August 20th 1931 providing in part that at the general municipal election to be held in Decatur on the third Monday in September 1932 and at each general

municipal election to be held quadrennially thereafter that five aldermen shall be elected from the city at large. The City of Decatur has never operated under a commission form of government."

On October 4, 1948, the date of the beginning of the term of office to which Mr. Harrison was elected in the municipal election held on September 20, 1948, there will be a vacancy in the office of Mayor of the City of Decatur. Having been elected to this office prior to his death, he and he alone had the inchoate right to become the actual incumbent of the office for the term beginning October 4, 1948, and his death before that date creates a vacancy in said office for said term. *State ex rel. Foster v. Rice*, 230 Ala. 608, 162 So. 292.

The question of the moment is: How shall this vacancy in the office of Mayor of the City of Decatur, for the term beginning October 4, 1948, created by the death of Mr. Harrison, the mayor elect, be filled?

A history and discussion of pertinent statutory provisions dealing with the form of municipal government of the City of Decatur is deemed advisable.

Act No. 573, General Acts 1890-91, page 1304, established a new charter for the City of Decatur and provided for a municipal government consisting of a mayor and council. Section 9 thereof provided that in the event of a vacancy in the office of mayor, from any cause, the city council, on five days' public notice, should have authority to elect some person to fill the vacancy thus created, the person so elected to hold the office to which he was elected for the remainder of the unexpired term.

While I do not find where this act has been specifically repealed, I am convinced that it no longer has any application to the City of Decatur.

By act No. 797, General Acts 1907, page 790, the Legislature provided for the organization, incorporation, government and regulation of cities and towns in this State, and defined the rights, powers, duties, jurisdiction and authority of such cities and towns and of the officers thereof. Section 200 of that act read as follows:

"That all laws and parts of laws, both general and special, in conflict herewith be and the same are hereby repealed."

This act, generally referred to as the Municipal Code, as certain sections thereof have been amended from time to time, has been successively codified in the Codes of 1907, 1923 and 1940, the 1940 codification appearing in Title 37 thereof.

The appellate courts of this State have had occasion to determine the effect of this Municipal Code. In *City of Birmingham v. Brown*, 13 Ala. App. 654, 69 So. 263, the Court of Appeals, speaking of the Municipal Code as it appeared in the Code of 1907, said:

"Our Municipal Code (Political Code of Alabama, Sections 1046 to 1460, inclusive), which is now the charter of the towns and cities of the state, * * * *."

While the Supreme Court of Alabama granted certiorari in this case in 195 Ala. 79, 70 So. 718, it was on a point entirely unrelated to the instant question.

Subsequently, the Supreme Court of Alabama considered the effect of the Municipal Code as it appeared in the Code of 1923 in the cases of *Lewis v. Jenkins*, 215 Ala. 680, 112 So. 205, and *Hamrick v. Town of Albertville*, 219 Ala. 465, 122 So. 448, from which I quote, respectively, as pertinent, as follows:

"The power of cities and towns, not falling within the provisions of the act approved August 20, 1915 (Acts of 1915, pp. 294-307), to regulate the erection of buildings on private property situated within their corporate jurisdiction, and promulgate reasonable rules regulating the issuance of building permits, is referable to the General Municipal Code, prescribing a uniform system for all municipal corporations, within the state, and supplanting charter provisions contained in special acts theretofore existing. Code of 1923. §§ 1739, 1740, 1992, 2012; *City of Birmingham v. Brown*, 13 Ala. App. 655, 69 So. 263." (Emphasis supplied.)

"The city acting under general municipal powers was not required to show affirmative election to come within the provisions of the Municipal Code. §§ 1739, 1740, 2174, et seq., Code. The record shows the municipality was in the exercise of such well-recognized corporate functions and powers under the law. *Cooper v. Valley Head*, 212 Ala. 125, 101 So. 874; *City of Birmingham v. Wills*, 178 Ala. 198, 59 So. 173, Ann. Cas. 1915B, 746. Old charter provisions were supplanted by the municipal code (*City of Birmingham v. Brown*, 13 Ala. App. 654, 69 So. 263; *Lewis v. Jenkins*, 215 Ala. 680, 112 So. 205; §§ 1739, 1740, 1992, 2012, Code), or by some of its provisions." (Emphasis supplied.)

Thus, it appears that the Municipal Code supplanted the provisions of Act No. 573, supra.

In 1923, by a series of local acts, the Legislature undertook to consolidate the City of Decatur and the City of Albany into the City of Decatur and to provide a municipal government for the consolidated City of Decatur. See Act No. 199, Local Acts 1923, page 102; Act No. 200, Local Acts 1923, page 104; Act No. 201, Local Acts 1923, page 104; Act No. 202, Local Acts 1923, page 105; and Act No. 206, Local Acts 1923, page 121. However, the Supreme Court of Alabama, in the case of *State ex rel. Bassett v. Nelson*, 210 Ala. 663, 98 So. 715, held Act No. 206, supra, to be unconstitutional and void, and the other companion acts above mentioned to be inoperative and invalid.

By Act No. 15, Local Acts 1927, page 3, the Legislature again altered or rearranged the boundary lines of the City of Decatur so as to include within the corporate limits of said city the territory then included within the City of Albany and other territory. The constitutionality of this act was upheld in *In Re Opinion of the Justices*, 216 Ala. 339, 113 So. 245, which holding was reaffirmed in *Troup v. City of Decatur*, 236 Ala. 393, 182 So. 817.

At that time, according to the census of 1920, the population of the City of Decatur was less than six thousand, and the population of the City of Albany was more than six thousand. After this act, which had the effect of consolidating the two cities into the City of Decatur, the City of Decatur had a population of more than six thousand and fell within the purview of the provisions of the Municipal Code, applicable to cities of six thousand population or more, as they appeared in the Code of Alabama 1923.

The applicable provision of that Code, so far as the composition of the city council was concerned, was Section 1757, Code of Alabama 1923, which provided for the composition of the city council in cities have a population of six thousand or more. This section was subsequently amended by Act No. 608, General Acts 1927, page 706, and later by Act No. 371, General Acts 1931, page 436. (It is interesting to note that the then Representative Tidwell, a member of the House of Representatives from Morgan County, in which the City of Decatur is located, was the author of the 1931 amendment.) Section 1757, as thus amended, was codified in the Code of Alabama 1940, as Title 37, Section 426 thereof, which reads as follows:

"In cities having a population of six thousand or more, there shall be elected at each general municipal election the following officers who shall compose the city council for such cities, and who shall hold office for four years and until their successors are elected and qualified, and who shall exercise the legislative functions of city government and any other powers and duties which are or may be vested by law in the city council or its members: A president of the city council; and in cities having seven wards or less, two aldermen from each ward, to be elected by the qualified voters of the several wards voting separately in every ward; except in cities of less than twenty thousand population, in which two aldermen from each ward shall be elected by the electors of the city at large; in cities having more than seven wards, one alderman from each ward, and a sufficient number of aldermen from the city at large to make the total number of aldermen fourteen exclusive of the president of the council; and in cities having fifty thousand population or more the city council may create not exceeding twenty wards. The president of the council shall have the right to vote on all questions the same as any other member of the council. *Provided, however, that the city council of any city having a population of six thousand or more may by ordinance or resolution, if adopted by two-thirds vote of the city council more than six months prior to any general municipal*

election, provide that the city council of said city shall consist of five aldermen to be elected from the city at large." (Emphasis supplied.)

The emphasized proviso was added to this section by the 1931 amendment. This amendment became effective on July 10, 1931, and according to the information which you have furnished me, the city council of the City of Decatur, on August 20, 1931, unanimously adopted Ordinance No. 238A, providing in part that, at the general municipal election to be held in Decatur on the third Monday in September 1932, and at each general municipal election to be held quadrennially thereafter, five aldermen should be elected from the city at large. It also appears from information which you have furnished me that on March 16, 1944, more than six months before the first general municipal election held after the effective date of the Code of 1940, the city council of the City of Decatur unanimously adopted a resolution reading, in part, as follows:

"That the city council of the City of Decatur shall consist of five aldermen to be elected from the city at large as provided in Section 426 of Title 37 of the Code of Alabama 1940."

Since the City of Decatur, according to the Federal Census of 1930 and the Federal Census of 1940, had a population of six thousand or more it appears that the city council of the City of Decatur has effectively availed itself of the proviso contained in Section 426, *supra*, and provided that the city council of said city shall consist of five aldermen to be elected from the city at large.

Municipal ordinances are presumed to be valid. See cases cited and collated in 15 Ala. Digest, Municipal Corporations, Key No. 122(2). A municipal ordinance, once properly and legally adopted, is presumed to continue in effect until repealed. *Bouyer v. City of Bessemer*, 17 Ala. App. 665, 88 So. 192. A municipal ordinance, duly adopted, can be repealed only by another ordinance duly proposed and adopted as provided by law. *Banks v. Peek*, 249 Ala. 32, 29 So. 2d. 418.

If the Municipal Code did not have the effect of supplanting Act No. 573, *supra*, as I have held that it did, then I am convinced that the subsequent course of action by the Legislature of this State, and of the city council of the City of Decatur in conformity therewith, related above, had the effect of supplanting the same.

Since it thus appears that the city council of the City of Decatur consists of five aldermen to be elected from the city at large, it becomes important to point out that there is no statutory authority for the City of Decatur to have a president of the council, as is the case with cities having a population of six thousand or more generally which have not availed themselves of the proviso of Section 426, *supra*. (In this connection, I am advised that at the municipal election held in the City of Decatur on September 20, 1948, only a mayor and five aldermen were elected from the city at large, and that no president of the city council was elected at that time.)

In making the statement that there is no statutory authority for a president of the city council in a city having a population of six thousand or more, which has availed itself of the proviso of Section 426, *supra*, I have not overlooked the provisions of Title 37, Section 429, Code of Alabama, which provide for the election, by the city council, in cities of more than six thousand population, of a president pro tempore. However, there is a distinct difference in the statutes between a president of the council, elected by the people, and a president pro tempore of the council, elected by the council itself.

If the City of Decatur had not availed itself of the proviso of Section 426, *supra*, and, consequently had a president of the council, elected by the people, then it appears that the following provision of Title 37, Section 428, Code of Alabama 1940, as amended by Act No. 451, General Acts 1943, page 414, applying to cities with a population of six thousand or more inhabitants generally, would govern the filling of the vacancy in the office of mayor of the City of Decatur for the term beginning October 4, 1948, occasioned by the death of the mayor elect:

"In the event of a vacancy, from any cause, in the office of mayor, the president of the council shall succeed to the office of mayor for the unexpired term; * * *."

However, since the City of Decatur has availed itself of the proviso of Section 426, *supra*, and has no president of the city council, I am convinced that this provision has no application.

It might be argued that the effect of the action of the city council of the City of Decatur in availing itself of the proviso of Section 426, *supra*, is to make all of the provisions of the Municipal Code relating to or dealing with the composition of the municipal government in cities of less than six thousand population applicable to the City of Decatur; and, that, therefore, the provision of Section 428, as amended, *supra*, for the filling of a vacancy in the office of mayor in cities with a population of less than six thousand would govern the instant situation. However, a mere perusal of the various provisions of the Municipal Code dealing with cities of less than six thousand population shows that this argument is not well taken. Be that as it may, if it had been the intention of the Legislature to enable cities with a population of six thousand or more to avail themselves of the form of municipal government applicable to cities of less than six thousand population, it would have been a simple matter for the Legislature to have said so, which it did not do.

Nor have I been able to find any presently applicable statutory provision specifically providing for the filling of a vacancy in the office of mayor of a city of six thousand or more population, which has availed itself of the proviso of Section 426, *supra*, and has a city council composed only of five aldermen elected from the city at large, as has the City of Decatur.

This being the case, it results that this vacancy should be filled by appointment of the Governor, under his residual appointive powers con-

tained in Title 41, Section 177, Code of Alabama 1940, which reads as follows:

"Whenever any office of the state, of any county, or municipality thereof, is vacant from any cause, and there is no way provided by law for the filling of such vacant office, the governor shall appoint a qualified person to fill the unexpired term of such office." (Emphasis supplied.)

Strong support for this conclusion is found in the case of *State on Inf. of Murphy v. Johnson*, 243 Ala. 114, 8 So. 2d. 890. In that case, the Court considered Title 17, Section 215, Code of Alabama 1940 (dealing with special elections), Title 41, Chapter 5, Sections 160, et seq., Code of Alabama 1940 (dealing generally with the subject of appointments to fill vacancies and especially Sections 176 and 177 thereof; and held that the Governor had the authority to fill vacancies on a county governing body created by local act.)

In opposition to this holding, it might be argued that the use of the words "for the unexpired term" in Section 177, *supra*, limits the appointive authority of the Governor therein conferred to the filling of a vacancy for an unexpired term, and that the vacancy in the term to which Mr. Harrison was elected on September 20, 1948, and which begins on October 4, 1948, is not a vacancy for an unexpired term. However, I have previously had occasion to consider the effect of the words "for the unexpired term" in a similar constitutional provision dealing with the filling of vacancies in the office of clerk of the circuit courts, and I concluded that those words were used to signify the length of time which a person appointed to fill a vacancy would hold the office by virtue of such appointment, and that they did not have the effect of limiting the appointive authority granted by the provision of which they were a part to the filling of vacancies for unexpired terms. See Quarterly Report of Attorney General, Volume 46, page 32.

The premises considered, I am convinced that the vacancy in the office of mayor of the City of Decatur, for the term beginning October 4, 1948, occasioned by the death of the mayor elect, should be filled by the Governor, under the authority vested in him by Section 177, *supra*, for the unexpired term, upon his being notified of the vacancy by the Judge of Probate of Morgan County, the county in which mayor elect Harrison resided at the time of his death. See Title 41, Section 165, Code of Alabama 1940.

Because of the importance of the question presented by your inquiry, I have, at the risk of tedium, sacrificed brevity for clarity, in an effort to give a proper answer to the question, after a full and complete consideration of all pertinent statutory provisions and court decisions.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

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